No. 7 4 1 1

No. 5110.

JAN
JOHN T. FEY, Clerk

United States Court of Appeals
For the First Circuit

GARDEN HOMES, INC.,

PLAINTIFF, APPELLANT,

v.

NORMAN P. MASON, Commissioner, Federal Housing Administration,

DEFENDANT, APPELLEE.

RECORD APPENDIX
TO
BRIEF FOR THE APPELLANT.

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UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW HAMPSHIRE.

Civil Action No. 1603

GARDEN HOMES, INC.,
Plaintiff,

v.

NORMAN P. MASON, Commissioner,
Federal Housing Administration,
Defendant.

DOCKET ENTRIES.

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Oct. 17 Petition for removal from Hillsborough County Superior Court; copy of writ and declaration. Removal bond in the sum of $500., Peerless Casualty Co., surety.

24 Plaintiff's Claim for Jury trial.

26 Plaintiff's Petition for Remand.

27 Defendant's motion for extension of time to answer, and Certificate of Service.

Nov. 15 Appearance of A. M. MacNeil as counsel for plaintiff specially not submitting to jurisdiction of court, and Certificate of Service.

23 Plaintiff's Request for Admissions of Facts, and Certificate of Service.

28 Defendant's Motion for Extension of Time for filing answer to Request for Admission to Facts, and Certificate of Service.

29 Duplicate Request for Admission of Facts submitted by Clancy & O'Neill.

Dec. 1 Defendant's Motion for Extension of Time for filing an answer to Request for Admission of Facts extended to December 11, 1955. Connor, J.

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Dec. 5 Stipulation for Release of Attachment.

5 Defendant's Motion for Order Vacating Attachment, and Certificate of Service.

7 Defendant's Motion for Further Extension of Time for filing answer to Request for Admission of Facts to and including December 30, 1955, and Certificate of Service.

8 Plaintiff's Requests for admission of material facts.

8 Plaintiff's Motion to Strike defendant's motion for order vacating attachment and stipulation.

9 Defendant's Response to Request for Admission of Facts, and Certificate of Service.

12 Plaintiff's Motion to Strike the Petition for Removal.

13 Plaintiff's Request for Admission of Facts by the Acting Secretary of the Treasury David W. Kendall.

13 Plaintiff's Motion for Production of Documents etc. under Rule 34.

13 Plaintiff's Motion to Strike Petition to Remove Action.

23 Defendant's motion for an extension of time to and including January 16, 1956, in which to answer the plaintiff's request for admission of facts by the Acting Secretary of the Treasury David S. Kendall, and Certificate of Service.

30 Hearing on plaintiff's petition for remand and on plaintiff's motion to strike the petition for removal is continued for local counsel to file appearance in this court. Continued for two weeks. Connor, J.

30 Hearing is had on defendant's motion for order vacating attachment. Taken under advisement. Connor, J.

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Jan. 3 Plaintiff's Petition for restraining order and injunction, and Certificate of Service.

3 Plaintiff's Request for Immediate Remand and for abstention of action in this court, and Certificate of Service.

10 Defendant's Objections to requests for admissions contained in the request for admission of material facts, and Certificate of Service.

10 Defendant's Objections to Requests for Admissions contained in the request for admission of facts by the Acting Secretary of the Treasury David W. Kendall, and Certificate of Service.

16 Defendant's Motion to Dismiss, and Certificate of Service.

20 Answer of Garden Homes, Inc. to Motion to Dismiss.

20 Plaintiff's Brief on Motion for remand and for dissolution of attachment.

24 Plaintiff's motion to strike objections to request for admissions of facts, and Certificate of Service.

Mar. 12 Appearance for defendant, Robert B. Wolf, Esq., General Counsel, FHA.

Hearing is had on plaintiff's petition for remand; defendant's motion for extension of time to file answer; defendant's motion for an extension of time in which to answer plaintiff's request for admission of facts by Acting Secretary of the Treasury, David S. Kendall; defendant's motion to dismiss; plaintiff's motion to strike the petition for removal; plaintiff's motion to strike petition to remove action; plaintiff's motion for production of documents etc. under Rule 34; plaintiff's petition for restrain-

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ing order and injunction; plaintiff's request for immediate remand and for abstention of action; plaintiff's motion to strike objections to requests for admissions of fact. Mr. MacNeil did not appear. All matters are taken under advisement. Connor, J.

Mar. 13 Plaintiff's Petition for Remand denied. Connor, J.

Plaintiff's motion to strike petition for removal denied. Connor, J.

Plaintiff's motion to strike petition to remove action denied. Connor, J.

Defendant's motion for extension of time in which to answer plaintiff's request for admission of facts by Acting Secretary of Treasury, David S. Kendall granted. Time extended to March 23, 1956. Connor, J.

Plaintiff's request for immediate remand and for abstention of action denied. Connor, J.

Plaintiff's Petition for restraining order and injunction denied. Connor, J.

Defendant's motion to dismiss denied, without prejudice. Connor, J.

Order, Connor, J., on plaintiff's motion for production of documents, granting motion to extent that defendant is to produce and permit plaintiff to inspect and photograph subject matter of paragraphs e, i, j, and k of motion, motion otherwise denied. (Copies to counsel).

14 Defendant's motion that time for filing answer be extended granted. Time for filing answer extended until plaintiff's motion to amend is disposed of. Connor, J.

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Defendant's motion for enlargement of time, and Certificate of Service.

Mar. 15 On defendant's motion for extension of time in which to answer plaintiff's request for admission of facts by Acting Secretary of Treasury, David S. Kendall, Order of March 13 amended by striking out the words "Time extended to March 23, 1956". Connor, J.

16 Plaintiff's Objections to allowance of motion for enlargement of time for answering demands to admit facts, and Certificate of Service.

19 Request for findings of fact and conclusions of law by plaintiff, and Certificate of Service.

19 Appeal to Court of Appeals for the First Circuit under Rule 73(b).

21 Mr. MacNeil was not present but letter read into record.

Hearing is had on plaintiff's motion to strike defendant's motion for an order vacating attachment and stipulation. Taken under advisement. Connor, J.

Hearing is had on defendant's motion for enlargement of time for filing an answer to plaintiff's request for admission of material facts. Motion granted.

On Petition for restraining order and injunction the following Order was made: "In compliance with Rule 52 of Federal Rules of Civil Procedure, the following finding of fact and conclusion of law are entered in support of the order of March 13, 1956: (1) Petition having been submitted without offer of evidence, no findings of fact could be made. (2) I conclude that the petition

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states no ground for an enjoining order." Connor, J.

On Objections to Requests for Admissions Contained in Request for admission of facts by the Acting Secretary of the Treasury David W. Kendall, motion for an order striking out requests numbered 1 to 10, inclusive, is granted. Connor, J.

Mar. 23 Motion to strike defendant's motion for order vacating attachment and stipulation denied. Connor, J.

Defendant's motion for order vacating attachment granted. Rescript to be filed as of this date.

Defendant will forthwith submit draft of discharge of attachment. Connor, J.

26 Hearing is had on defendant's motion in its objections to requests. No one appeared in person for the plaintiff.

Plaintiff's motion to strike objections to request for admissions of facts denied. Connor, J.

Defendant's motion for an order striking out plaintiff's requests for admissions granted. Requests numbered one to 18 inclusive stricken. Connor, J.

On Plaintiff's motion to amend declaration filed October 5, 1955, the Court made the following order: "Without objection, the motion is granted." Connor, J.

Order Vacating Attachment, Connor, J. (Copies to Garden Homes, Inc., and Maurice P. Bois, U. S. Atty.)

27 Answer of defendant, and Certificate of Service.

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Mar. 28 Order that action be in order for trial thirty days after entry of this order. Connor, J.

A true copy certified this twenty-ninth day of March, 1956.

(s) ELIZABETH M. HOYT,
Chief Deputy Clerk.

[SEAL]

PETITION FOR REMOVAL.

To the United States District Court for the District of New Hampshire:

Now comes Norman P. Mason, Commissioner, Federal Housing Administration, and shows:

1. On the twenty-sixth day of July, 1955, the above entitled action was commenced in the Superior Court of the State of New Hampshire for the County of Hillsborough, against the petitioner for breach of covenant.

2. Before the commencement of the action, and at all the times hereinafter mentioned, Norman P. Mason was and now is Commissioner of the Federal Housing Administration.

3. At all the times mentioned in the action, the petitioner was acting solely under the color of his office, and all his acts in connection with the matters charged in said complaint were committed by him under color of his said office.

4. Petitioner has not been served with process but the writ was entered with a non est inventus return.

5. A certified copy of the return and motion to amend the declaration setting forth the claim for relief upon which the action is based was first received by the petitioner on October 5, 1955, and is appended hereto.

6. No other process, pleadings or orders have come to the attention of your petitioner.

7. This action is an action in which the District Court of the United States has original jurisdiction.

8. This action, if tenable at all, arises under a law of the United States.

9. That the matter in dispute exceeds the sum of $3,000, exclusive of interest and costs, the suit being for the sum of $1,000,000.

10. This is an action between citizens of different states.

11. This petition is accompanied by a bond with good and sufficient surety conditioned that your petitioner will pay all costs and disbursements incurred by reason of these removal proceedings should it be determined that this action was not removable or was improperly removed.

WHEREFORE, your petitioner prays that the said action may be removed from the state court into this court for trial and determination, as provided for by Title 28, Section 1442 of the United States Code.

Dated this seventeenth day of October, 1955.

NORMAN P. MASON, *Commissioner,*
Federal Housing Administration
By WILLIAM MAYNARD
Assistant United States Attorney

STATE OF NEW HAMPSHIRE:
COUNTY OF MERRIMACK: ss. October 17, 1955

Personally appeared the above named William Maynard, Assistant United States Attorney, and stated that he has read the foregoing petition for removal and that the matters contained therein are true, to the best of his knowledge, information and belief.

Before me.

GEORGE A. COLBATH
Notary Public [SEAL]

October 17, 1955

I hereby certify that a copy of the foregoing petition has been mailed this date, postage prepaid, to Arthur S. Healy, Clerk, Hillsborough County Superior Court, Nashua, New Hampshire, and to Clancy & O'Neill, Esqs., 148 Main Street, Nashua, New Hampshire, counsel of record for Garden Homes, Inc.

WILLIAM MAYNARD
Assistant United States Attorney

THE STATE OF NEW HAMPSHIRE

Hillsborough, ss To the Sheriff of any County or his deputy; we command you to attach the goods or estate of Norman P. Mason of Washington, D.C. as Acting Commissioner of the Federal Housing Administration, to the value of one million dollars and summon him if to be found in your precinct to appear at the Superior Court to be holden at Nashua in said County of Hillsborough on the First Tuesday of October 1955 to answer to Garden Homes Inc. a corporation duly established under the laws of the Commonwealth of Massachusetts and having a principal place of business at 294 Washington St., Boston, Massachusetts, to a plea of the case for that the said defendant at Nashua on the day of purchase of this writ being indebted to the plaintiff in the sum of one million dollars for money by the plaintiff before that time lent and advanced to and paid laid out and expended for the defendant at his request; and for money before that time had and received by the defendant for the plaintiff's use; for interest upon certain sums of money before that time due and owing from the defendant to the plaintiff; for goods wares, and merchandise before that time sold and delivered by the plaintiff to the defendant at his request; for labor and services before that time done and performed, and materials provided by the plaintiff for the defendant at his re-

quest; for labor services and advice, attendance travel, and medicine, performed, bestowed, and furnished by the plaintiff as a physician and surgeon for the defendant and his family at the request of the defendant; for the use and hire of diverse goods and chattels, horses, carriages, and teams of the plaintiff by him let to hire to the defendant at his request; and for food, drink, washing and lodging and other necessaries, found and provided by the plaintiff for the defendant and his family, at the request of the defendant; for horsemeats, stabling and attendance provided by the plaintiff for diverse horses of the defendant at his request; and for the use and occupation of a certain dwelling house of the plaintiff for a long time used and occupied by said defendant at his request by permission of the plaintiff; also in the further sum of dollars— cents according to the account hereto annexed, in consideration thereof then and there promised the plaintiff to pay him said several sums on demand yet though often requested has never paid the same, but neglects and refuses so to do; and also for that the said defendant at— aforesaid on the — day of — 19— by promissory note of that date, for value received promised the plaintiff to pay — or order the sum of — dollars and — cents; on demand with interest; yet though often requested has never paid the same, To the damage of the plaintiff as it says the sum of one million dollars.

We also command you to attach the money, goods, chattels, rights, and credits of the said Norman P. Mason, Acting Commissioner as aforesaid in the hands of John Doe to the value of one million dollars and summon said trustee if to be found in your precinct to appear at said Court and show cause why execution should not issue against him for the judgment which may be recovered by said plaintiff against the principal defendant and make return of this writ, with your doings thereon.

Witness Stephen M. Wheeler, Esquire the twenty-sixth day of July A.D. 1955.

ARTHUR S. HEALY, *Clerk*

Hillsborough, ss. July 28, 1955.

I then attached all the rights, title interest and claim which the within named defendant has to any house, lands and tenements in the County of Hillsborough in said County, however the same may be situated, bounded or described by leaving an attested copy of this writ, and an attested copy of this my return endorsed thereon by me at the office of Donat Corriveau, Register of Deeds of said County of Hillsborough at 11 o'clock and fifty minutes of the forenoon of the same day.

JOHN L. SPILLANE, *Deputy Sheriff*

Hillsborough, ss. September 19, 1955.

I have made a diligent search for the within named defendant and not finding him within my precinct I made no further service. Fees $3.00

JOHN L. SPILLANE, *Deputy Sheriff*

THE STATE OF NEW HAMPSHIRE

Superior Court.

Hillsborough, ss. September Term, 1955

Garden Homes Inc. v. Norman P. Mason,
Acting Commissioner, Federal Housing Administration.

No. 10770 MOTION

The plaintiff moves as follows; That the writ be amended by annexing thereto the declaration attached hereto;

In a plea of covenant broken, for that the defendant, or his predecessors in office, entered in a written agreement under the seal with the plaintiff on or about August 10, 1949, the terms of which agreement are too numerous to enumerate herein but an executed original copy of which shall be produced in court, wherein said defendant or his

predecessor in office, did covenant and agree to insure and guarantee under the provisions of the National Housing Act Title 12 U.S.C. sec. 1743, as amended, the payment of a certain mortgage note in the sum of $1,252,900.00 dollars, as executed by the plaintiff and payable to the Worcester Federal Savings and Loan Association, a corporation doing business at Worcester, in the County of Worcester, and Commonwealth of Massachusetts, and secured by a mortgage of the real estate owned by said plaintiff, known as North Union Heights and situate in Manchester, in said County of Hillsborough dated August 10, 1949, and recorded in said Hillsborough County, Registry of Deeds in volume 1230, page 261, and subsequently assigned by said Worcester Federal Savings and Loan Association, June 12, 1952, to Franklin D. Richards, as Federal Housing Administration Commissioner, by assignment recorded in said Hillsborough County Registry of Deeds in volume 1323, page 275; yet the defendant, or his predecessor in office, did fail to perform the terms of said agreement by refusing and failing to furnish the guaranteed payments at the times and in the amounts provided for in said agreement, although the plaintiff performed its part of said agreement, thereby causing the plaintiff to be diversed of the legal title to said real estate through foreclosure proceedings wherein the rights of the plaintiff herein against the defendant or his predecessor in office, for the breach of said agreement could not be and were not adjudicated, and as a result of said foreclosure the legal title to said real estate was acquired by the defendant, or his predecessor ni office as appears in the records at said Hillsborough County Registry of Deeds at a price which did not reflect the true value of said real estate; thereby destroying the economic security and stability of the plaintifts housing project on said real estate; depriving the plaintiff of its use and possession of property; causing the plaintiff to

incur great financial loss and damage; placing the credit and business reputation of the plaintiff in jeopardy; contrary to the covenant of the defendant or his predecessor in office, aforesaid; and so the defendant or his predecessor in office, his covenant has not kept, but has broken the same, all to the damage of the plaintiff as it says, in the sum of one million dollars.

March 26, 1956. Without objection the motion is granted.

(s) ALOYSIUS J. CONNOR
U. S. District Judge

THE STATE OF NEW HAMPSHIRE

Hillsborough, ss.

I, Arthur S. Healy, clerk of the Superior Court of the State of New Hampshire for the County of Hillsborough the same being a court of record, having a seal and having custody of the records of said Superior Court do hereby certify that the foregoing is a true copy of the writ entered on the first Tuesday of October 1955, and of the motion to amend the declaration filed October 5, 1955 in the action 10770 *Garden Homes Inc.* v. *Norman P. Mason, Acting Commissioner, Federal Housing Administration* at this September Term, 1955 of said Superior Court. In witness whereof I have hereunto set my hand and affixed the seal of said Superior Court this fifth day of October A.D. 1955.

(s) ARTHUR S. HEALY, *Clerk*

BOND FOR REMOVAL.

Filed Oct. 17, 1955
Civil Action 1603

State of New Hampshire,
County of Merrimack, ss.

Know all men by these Presents that the United States of America, as principal and the Peereless Casualty Company, a Corporation organized and existing under the laws of the State of New Hampshire with its principal place of business at Keene in the County of Cheshire and State of New Hampshire, as surety, are held and firmly bound unto Garden Homes Inc., a corporation duly established under the laws of the Commonwealth of Massachusetts and having a principal place of business at 294 Washington Street, Boston, Massachusetts, in the sum of five hundred dollars ($500.00) for the payment of which, well and truly to be made, we, and each of us bind ourselves, our successors and assigns, jointly and severally by these presents.

Whereas, Norman P. Mason, of Washington, D. C. as Commissioner of the Federal Housing Administration, has petitioned the United States District Court for the District of New Hampshire, for the removal to said Court of an action now pending in the Superior Court of the State of New Hampshire in and for the County of Hillsborough, wherein Garden Homes Inc. is the plaintiff and said Norman P. Mason as Commissioner of the Federal Housing Administration is defendant, and being numbered 10770 upon the docket thereof;

Now, therefore, the condition of the above obligation is such that if the said Norman P. Mason as Commissioner of the Federal Housing Administration shall pay all costs and disbursements incurred by reason of the said removal proceedings should it be determined that the said action was not removable or was improperly removed, then this obligation shall be null and void, otherwise it shall remain

in full force and effect. Witness our hands and seals this seventh day of October 1955.

UNITED STATES OF AMERICA
By WILLIAM MAYNARD
Assistant U. S. Attorney

[SEAL]

PEERELESS CASUALTY COMPANY
By MARY C. CAHILL
Attorney in fact surety.

ARTHUR P. REINHART
witness to both

Countersigned at Concord, N.H.
MORRILL & EVERETT INC.
By MARY C. CAHILL, *Asst. Secretary*
Resident Licensed Agent

CLAIM FOR JURY TRIAL

Filed Oct. 24, 1955

Now comes the plaintiff in the above entitled action and appears specially and does not submit to the jurisdiction of the Court but appears solely for the purpose of complying with the requirements of the law that make necessary the claim of jury trial within a limited period of entry in this court and in the assumption that the court may not have time within which to act properly before the expiration of time limit to claim jury, the plaintiff claims trial by jury of all issues triable by jury.

By its attorney
(s) A. M. MACNEIL

APPEARANCE.

Mr. Clerk, Enter my appearance as counsel for the plaintiff specially not submitting to the jurisdiction of the court, in the above entitled case.

A. M. MACNEIL
address 547 Somerville Ave., Somerville, Mass.

Dated at Concord, N. H. on the 15th day of Nov. 1955.
Copy sent to U. S. Atty.

MOTION.

To the United States District Court for the District of New Hampshire:

Now comes Norman P. Mason, Commissioner, Federal Housing Administration, and moves:

That the time for filing an answer, under Rule 81(c) of the rules of Civil Procedure, be extended until such time as there has been a determination of the plaintiff's motion to amend the omnibus declaration on the writ or until such time as the plaintiff shall replead, and for twenty days thereafter.

NORMAN P. MASON, *Commissioner,*
Federal Housing Administration
By MAURICE P. BOIS
MAURICE P. BOIS
United States Attorney

REQUEST FOR ADMISSION OF FACTS.

Now comes the plaintiff in the above entitled action and states that it calls upon the defendant to admit the following facts for the purposes of this case.

1) That the defendant did not furnish to the plaintiff a copy of the petition to remand with the exhibits included therein, as required by the rules of Civil procedure.

2) That Norman P. Mason was served a copy of the declaration filed in this action by A. M. MACNEIL of Counsel more than twenty days prior to the filing of the petition for removal being filed in Court.

3) That said copy of the declaration set forth the claim upon which this action was based.

4) That said Norman P. Mason was fully informed of the pendency of this action in July of 1955.

5) That Norman P. Mason caused an investigation into the existence and claims contained in this suit in August 1955.

6) That the defendant was personally served with copies of the pleadings in this action long prior to twenty days before the petition for removal was filed in court.

7) That Norman P. Mason was represented by other counsel prior to engagement of present counsel.

8) That the plaintiff does not reside in the State of New Hampshire.

9) That the acts complained of occurred at Worcester, Mass. not in the judicial district of this court.

10) That Norman P. Mason is a domicillary and citizen of Chelmsford, Massachusetts.

11) That there is no diversity of citizenship between the plaintiff and the defendant.

12) That in this action there is no federal issue to be construed by the Court.

13) That the acts of the Federal Housing Commissioner are to be construed under the law as though they were performed by private citizens.

14) That if this court finds and rules that the defendant is the beneficiary of the laws applicable solely to the officers of the United States then the amount in controversy exceeds ten thousand dollars the limit of jurisdiction of the District Courts in actions against the United States.

15) That no copy of the required bond was furnished to the plaintiff on removal.

16) That the time for removal had expired at the time when the petition for removal was filed.

By its attorneys

(s) A. M. MacNeil

MOTION FOR EXTENSION OF TIME.

Now comes Maurice P. Bois, United States Attorney, and respectfully requests that the time for filing an answer to the Request for Admission of Facts be extended to allow submission of said request to Norman P. Mason, Commissioner, Federal Housing Administration.

MAURICE P. BOIS
United States Attorney

STIPULATION FOR RELEASE OF ATTACHMENT.

Whereas in an action at law commenced in the Superior Court of New Hampshire for Hillsborough County, by a writ dated July 26, 1955, the plaintiff, Garden Homes, Inc., attached certain real estate of the defendant Norman P. Mason, Commissioner, Federal Housing Administration, on September 19, 1955; and

Whereas a Petition for Removal was filed in the United States District Court for the District of New Hampshire on October 17, 1955; and

Whereas Maurice P. Bois, United States Attorney for the District of New Hampshire, was on November 25, 1955, authorized by David W. Kendall, Acting Secretary of the Treasury, to stipulate for the discharge of said real estate from the lien of said attachment;

Now, Therefore, it is stipulated and agreed, for the benefit of Garden Homes, Inc. that the said Garden Homes, Inc., shall, upon the discharge of said attachment, become entitled to all the benefits of sections 308 and 309 of Title 40 of the United States Code.

MAURICE P. BOIS
United States Attorney
District of New Hampshire

MOTION FOR ORDER VACATING ATTACHMENT.

Whereas in an action at law commenced in the Superior Court of New Hampshire for Hillsborough County, by a writ dated July 26, 1955, the plaintiff, Garden Homes, Inc., attached certain real estate of the defendant Norman P. Mason, Commissioner, Federal Housing Administration, on September 19, 1955; and

Whereas a Petition for Removal was filed in the United States District Court for the District of New Hampshire on October 17, 1955; and

Whereas Maurice P. Bois, United States Attorney for the District of New Hampshire, was on November 25, 1955, authorized by David W. Kendall, Acting Counsel General, to stipulate for the discharge of said real estate from the lien of said attachment; and

Whereas Maurice P. Bois on December 5, 1955, stipulated and agreed for the benefit of Garden Homes, Inc. that the said Garden Homes, Inc. shall upon the discharge of said attachment become entitled to all the benefits of sections 308 and 309 of Title 40 of the United States Code;

Now, Therefore, Norman P. Mason, Commissioner, Federal Housing Administration, moves this Court for an order vacating said attachment.

NORMAN P. MASON, *Commissioner*
Federal Housing Administration
By MAURICE P. BOIS
MAURICE P. BOIS
United States Attorney

MOTION FOR FURTHER EXTENSION OF TIME.

Now comes Maurice P. Bois, United States Attorney, and respectfully requests a further extension of time for filing an answer to the Request for Admission of Facts to and including December 30, 1955, on the grounds that the information necessary to prepare an appropriate answer has not as yet been received from Norman P. Mason, Commissioner, Federal Housing Administration.

MAURICE P. BOIS
United States Attorney

REQUEST FOR ADMISSION OF FACTS BY THE ACTING SECRETARY OF THE TREASURY DAVID W. KENDALL.

Now comes the plaintiff in the above entitled action and states that;

1) The said David W. Kendall acting secretary of the Treasury of the United States has attempted to intervene in this action by authorizing the filing of a stipulation for removal of the Attachment in this action.

2) The plaintiff alleges that said Kendall has no right to file such a stipulation under the laws of the United States but if the court is to consider said attempt it is necessary to have the essential facts before the court and some of them are peculiarly in the possession of said intervener wherefore your plaintiff respectfully requests the said David W. Kendall to admit for the purposes of said matter the following facts in ten days hereof;

1) That the property of North Union Heights which is the real estate in controversy in this litigation has a present worth or value in excess of $1,000,000.00.
1950 at an estimated cost of $1,565,000.00.

2) The said real estate was constructed in 1949 to 1950 at an estimated cost of $1,565,000.00.

3) That values and costs of construction have risen considerably since the time of construction so that the value of said property in contemplation of sale is in excess of the cost of construction.

4) That the F.H.A. in representing the defendant is desirous of selling said real estate to one Joseph Talamo of Worcester, Mass. for a total consideration of less than $677,000.00.

5) That the defendant has had outstanding since weeks before he received from said Talamo a proposal for release of defendants interest in said property in excess of the consideration offered by said Talamo and that said proposal from the plaintiffs has never been either withdrawn or rejected.

6) That the said Kendall is aware that the defendant is anxious to consummate the said sale to said Talamo as quickly as possible and without any more delay than is unavoidable.

7) That the said Kendall knew at the time of approving the authorization to file the stipulation referred to in the motion to release attachment that the liability of the United States could be in excess of $300,000.00 more than the amount received by the defendant if said sale were consummated by him.

8) That the said Kendall knew at the time of approving the authorization to file the stipulation that if the defendant accepted the offer of the plaintiff there would be no necessity of a stipulation such as suggested by the motion and that the defendant would receive in cash without delay a sum in cash for the release of his interest in said property in excess of that offered by said Talamo and in addition thereto a complete release of all claims in this action.

9) That said Kendall knew at the time he authorized the filing of a stipulation such as described in the motion for release of attachment that the defendant was gaining nothing by accepting the offer of Talamo that he would not receive if he accepted the offer of Garden Homes Inc. and in addition to said amount he would receive a clear release of all claims of the plaintiff which could run to hundreds or thousands of dollars.

9a) That there is no legal or moral justification for risking the possibility of tremendous losses in view of the fact that the plaintiff co-operated with the programs of F.H.A. at a time when the said Talamo refused to so co-operate with said programs.

9b) That the said Kendall realizes that the liability of the United States could exceed the amount of the ad damnum of the writ in this case if allowed to be filed while the amount to be received by the defendant upon sale as contemplated from said Talamo would not exceed a base amount of $678,000.

9c) That the said Kendall is granting the authority to so stipulate with full knowledge of the possibilities set forth herein and freely and without reservation has granted said right and authority to so stipulate as set out in the motion to release the attachment.

10) That said Kendall is fully aware that the amount to be received from releasing the interest of F.H.A. in said property known as North Union Heights, Manchester could be received without risk of loss or further liability from the constructors of said property.

GARDEN HOMES INC.
by (s) A. M. MACNEIL

MOTION TO STRIKE DEFENDANT'S MOTION FOR ORDER VACATING ATTACHMENT AND STIPULATION.

Now comes the plaintiff and states that the Court has not as yet made any decree or order concerning jurisdiction of the court itself, that such determination is essential before any other proceedings may be had. That the provisions of the United States Code make provision for release of property owned by the United States not by one in the position of the defendant to whom immunities in suits enjoyed by other governmental representatives has been denied.

That the provisions of the act under which this motion is filed specifically restricts its operation to those cases in which property of the United States is held by State Courts process. That the removal of the case to the Federal court remoyed the applicability of the section if it ever applied see section 1450 of title 25 U.S.C. If the removal of the case to the Federal court is found to be improper the stipulation is ineffective because filed in the wrong place.

That the proceedings here followed are not in accord with provisions of the U.S.C.

Wherefore your plaintiff prays that the motion for order vacating attachment be stricken from the records.

By its attorneys
(s) A. M. MacNeil

RESPONSE TO REQUEST FOR ADMISSION OF FACTS.

Comes Norman P. Mason, as Federal Housing Commissioner, and, for his response to the Request for Admission of Facts filed by plaintiff in this cause, says:

1. That the petition to remand was handled by the Department of Justice, and that he is not advised as to whether or not a copy of the petition to remand in this case was served on plaintiff, and, for lack of information, denies that such petition was not properly served.

2. That he has no record or recollection of having been officially or personally served with process in this case; but that, upon learning of the pendency of the action he immediately caused the petition for removal to be filed. Defendant, therefore, denies that he was served with a copy of the declaration in this case more than twenty days prior to the filing of the petition for removal.

3. That defendant is not advised as to whether or not the declaration in this case sets forth the claim on which this action is based, or whether it sets forth a cause of action. Defendant, therefore, cannot admit this request.

4. That he denies that he was fully informed of the pendency of this action in July, 1955.

5. That he denies that he caused an investigation into the existence of, and claims contained in, this action in August, 1955.

6. That he denies that he was personally served with copies of the pleadings in this cause more than twenty days before the petition for removal was filed in this case.

7. That he has been represented at all times in all litigation growing out of this matter by the Department of Justice. He, therefore, cannot admit this request.

8. That he is not advised as to the domicile of plaintiff in this case, or as to whether or not plaintiff is at this time a legal entity. He cannot, therefore, admit this request.

9. That defendant is not advised as to where the cause of action involved in this action occurred or accrued, or whether any cause of action did occur or accrue in any jurisdiction. He, therefore, cannot admit this request.

10. That he admits that, personally, he is a citizen of the State of Massachusetts, but states that, in his official capacity, his office and place of business is in Washington, D. C.; and that the alleged actions on which this purported suit is based arose out of defendant's official, and not his personal, conduct.

11. That he denies this request, and states that, in any event, jurisdiction of the federal court in this case is not founded on diversity of citizenship.

12. That he denies this request, and alleges that the issue to be determined, if any, is one between the plaintiff and the United States of America.

13. That he denies this request on the ground that it is improper, does not involve any fact, but calls for a conclusion of law.

14. That this request is denied for the reasons set out in "13", above.

15. That he is not advised as to whether or not any copy of the bond for removal was furnished to plaintiff, but states that, in any event, no bond would have been required in this case. This request is, therefore, denied.

16. That this request is denied as being improper, and as calling for a conclusion of law.

NORMAN P. MASON, as
Federal Housing Commissioner

Subscribed and sworn to before me on this 5th day of December, 1955.

[Signed]
Notary Public
District of Columbia

PETITION FOR RESTRAINING ORDER AND INJUNCTION.

Now comes the petitioner in the above entitled action and states that;

1) The defendant is attempting to circumvent the law concerning the remand of this case to the State Courts of the State of New Hampshire by prosecuting a motion herein for the vacating of an attachment in this action existing by State Court process against the property of the defendant in the County of Hillsboro.

2) That by the laws of the United States the plaintiff cannot recover a judgment and realize upon that judgment and execution resulting therefrom except upon the maintenance of a valid binding attachment against his property. That the defendant well knows that this court is without jurisdiction of this case and that the proper court for the disposition of all motions except one to remand is in the State Courts.

3) That by obtaining an order for the vacating of the present attachment from this court the defendant upon information and belief intends to record such an order for the purpose of depriving the plaintiff of the security given to it by law for the satisfaction of the judgment to be obtained in this action and thereby to defeat the rights of the plaintiff by this method.

4) That the defendant well knows that the provisions of Title 40 of the United States Code are not applicable to defendants whose property is attached even though they may be holding for the agency of the United States.

Wherefore your plaintiff prays that your defendant, his agents, servants, employees and attorneys be restrained and enjoined from taking further action before the United States District Court for the District of New Hampshire to vacate the attachment upon the property of the defend-

ant in the State of New Hampshire until after the Court has acted upon the Motions to remand filed in this case and the motion to vacate removal of this action to this court.

2) That the jurisdiction of this court be determined to be limited and exclusive of consideration of this action and that the defendant be restrained and enjoined from exercising any rights derived from the orders of this court for discharge of attachment until review is had by the Court of Appeals if such order is entered.

By its attorney
(s) A. M. MacNeil

Copy has been served upon Counsel for the Defendant subscribed and sworn to before me.

[Signed]
Notary Public

MOTION TO STRIKE PETITION TO REMOVE ACTION.

Now comes the plaintiff and stated that the petition to remove this action from the State Courts to the Federal Courts is in violation of Rule 11 and Rule 7 of the Rules for Civil Procedure of the District Courts.

The Plaintiff respectfully moves that said petition to remove be stricken in accordance with the provisions of said rules. The records of the clerk's office including the filed papers in this case prove the facts needed to sustain this motion.

Garden Homes Inc.
By (s) A. M. MacNeil
347 Somerville Ave.
Somerville, Mass.

MOTION TO STRIKE THE PETITION FOR REMOVAL.

Now comes the plaintiff in the above entitled action and states that

1) The petition for removal of this case to the United States Courts appears to be under oath as required by the laws of the United States and signed by the United States Attorney. That the said facts of verification both by affidavit and by rule 11 of the rules of civil procedure prove conclusively that a fraud has been perpetrated upon this court and upon opposing parties by the answers to requests for admission of facts filed under rule 36 of said rules of civil procedure.

2) That the petition to remove contains many false and improper statements as a basis for applying to this court for assistance, that if the truth were set forth in said petition the court would of its own motion decline jurisdiction.

3) That the essential allegations needed to maintain a petition for removal are now lacking in the said petition as a matter of law.

4) That the defendant while admitting that he has no knowledge of the matters answered in some of his answers to the request for admission of fact yet under oath stated that he denied the facts of which he has no knowledge, and is thereby in contempt of the court and is abusing its processes.

Wherefore your plaintiff respectfully prays that the petition for removal be dismissed and the case remanded to the State Courts.

By its attorneys
(s) A. M. MacNeil

PETITION FOR REMAND.

To the Honorable Judge of the District Court of the United States for the District of New Hampshire;

Now Comes the plaintiff in the above entitled matter and states that;

1) The defendant has not given or furnished a copy of his petition for removal to the plaintiff as required by rules of court by failing to attach the copy of process and pleadings served upon him in this action to the copies of the petition sent to the plaintiff.

2) The plaintiff appears specially and does not submit to the jurisdiction of this court for the specific purpose of filing and pressing for allowance its motions for remand and petitions for same as well as for the purpose of claiming jury trial in the event that the Court has not remanded this case by the time jury trial must be claimed.

3) That Norman P. Mason was served with a copy of the declaration in this action by Angus M. MacNeil of counsel more than twenty days before this petition for removal was filed in this court. That said declaration was a copy and was a pleading setting forth the claim for relief upon which such action is based. The said Norman P. Mason was fully informed of the pendency of this action in July of 1955. He further caused an investigation into the existence of this suit to be made in August of 1955. He therefore has lost all rights of removal of this action if any he had at any time.

4) That the allegations contained in paragraph 6 of the petition are in error as Mr. Mason was personally served with pleadings in this action although said service of said pleadings may be unknown to his local counsel although known to his Washington counsel.

5) The district court of the United States for the District of New Hampshire has no jurisdiction in this case

for by virtue of title 28 of the United States Code Section #1402 this action if it proves to be an action against the United States under the laws of the United States and not in an exempt classification by which the defendant is subject to the application of all rules generally applicable to private litigants, and can only be prosecuted in the jurisdiction in which the plaintiff resides namely in the District Court for the District of Massachusetts. There is no jurisdiction of the plaintiff in the District Court for the District of New Hampshire for the said reason and the further reason that all acts complained of in tort were performed in Massachusetts and the claim in contract can only be prosecuted in the Massachusetts Court. See sec. 1402. The plaintiff is a Massachusetts corporation and has no usual place of business in New Hampshire.

6) That the acts of the Federal Housing Commissioner are to be construed by the local laws by virtue of the enabling legislation, and he holds no special rights in the construction of his obligations from that of a private person and that there is no Federal question herein involved.

7) That the claim is one in excess of $3,000.00 in fact for in excess of said amount to the extent that this court has no jurisdiction of the claim, for its jurisdiction is limited against the United States and its agencies to $10,000.00 or less. See U.S.C. Title 28 sec. 1346.

8) That although the petition is verified none the less it is in error in the claim that this is an action between the citizens of two states. The facts, easily ascertainable, are that the Plaintiff is a MASSACHUSETTS CORPORATION and the defendant is a CITIZEN OF MASSACHUSETTS. Both plaintiff and defendant are citizens of the one State, without diversity of citizenship.

9) No copy of Bond was furnished to the plaintiff in said copy of petition.

10) That on the basis of the facts that a) The statutes

prohibit removal at this late date, time for removal having long since expired, b) this court has no jurisdiction of a claim against the agency of the United States in excess of $10,000.00. c) there is no diversity of citizenship between the parties both being subjects of the Commonwealth of Massachusetts. d) the court from which this case is sought to be removed has no such limitations and is a court of general jurisdiction. e) that there exists no ground under which this court can acquire jurisdiction against the wishes of the plaintiff, the PLAINTIFF RESPECTFULLY PRAYS THAT THIS CASE BE REMANDED TO THE SUPERIOR COURT FOR THE STATE OF NEW HAMPSHIRE AS REQUIRED BY LAW.

By its attorney
(s) A. M. MACNEIL

REQUESTS FOR ADMISSION OF MATERIAL FACTS.

Now comes the plaintiff in the above entitled action and requests the defendant to admit or deny the following facts to be used for the purposes of the hearing of this case especially for the hearing of motion for order vacating attachment:

1) That the fair market value of the property at North Union Heights Manchester N.H. constructed by the plaintiff and subject matter of this suit is in excess of $1,000,000.00 the amount of the attachment.

2) That the value placed upon said property by the predecessors of the defendant in office on August 1949 was $1,565,000.00 at least.

3) That the defendant has in contemplation a sale of the said real estate in the amount of $677,000.00 or within one thousand dollars of that amount.

4) That the plaintiff offered to the defendant the said amount equivalent to that in contemplation of the present sale plus other considerations.

5) That the sale price in contemplation by the defendant is not the highest consideration offered at, before or since for conveyance of deed to this property

6) That the plaintiff had notified the defendant that it was ready able and willing to give greater consideration to the defendant for release of his interest in this said property than that anticipated by present negotiations.

7) That no legal justification exists for the failure of the defendant release his interest in said property to the plaintiff upon payment of consideration offered that has not arisen since the said offer of the plaintiff was made.

8) That the offer of the plaintiff has never been withdrawn nor has it been rejected.

9) That no release of the attachment is necessary if the release is delivered to the plaintiff of all interests of the defendant upon the payment of the stipulated consideration.

10) That the consideration for said release to the plaintiff of all interest of the defendant in said real estate is in excess of that offered by the anticipated transferee.

11) That the present attachment is effective through the courts of the United States and not of the State of New Hampshire.

12) That the defendant well knew of the existence of a bill in equity in the Superior Court of Massachusetts at the time he was negotiating for the sale of this property subject matter of this action, and that the plaintiff in this action was plaintiff in that action and that the defendant in this action was the successor of the defendant in that action.

13) That the defendant knew at the time of negotiations in the present anticipated sale of this subject property and now that a decree may be entered in said Massachusetts action ordering a reconveyance of the said property to the plaintiff.

14) That in the plans of the defendant he will be unable

to comply with such a decree of the Massachusetts Courts if on final determination he is ordered to reconvey the said property to the plaintiff.

15) That the actions of the defendant as now planned will tend to defeat the decrees of the Massachusetts Courts of competent jurisdiction without awaiting the entry of final decrees.

16) That the defendant has been duly served with process in the said action in the Superior Court of Massachusetts.

17) That the defendant has appeared generally to this action in the superior courts of Massachusetts some several years before this action was commenced and became subject to its decrees and order in 1952 through the actions of his predecessors.

18) That there is no valid reason for the failure of the defendant accepting the offer of the plaintiff and then offering the property to others for a lesser consideration.

By its attorneys,

(s) A. M. MacNeil

MOTION FOR PRODUCTION OF DOCUMENTS ETC. UNDER RULE 34.

Plaintiff Garden Homes Inc. moves the court for an order requiring defendant Norman P. Mason:

1) To produce and permit plaintiff to inspect and to copy each of the following documents:

a) The original contract between the Plaintiff and the Worcester Federal Savings and Loan Association and The Federal Housing Commissioner for the Federal Housing Administration dated on or about August 10, 1949 including all exhibits attached thereto as well as all parts of said agreement including but not limited

to plans specifications minimum property requirements applicable to said contract change orders and approvals to said agreement.

b) Wage rate schedules attached to said contract or incorporated therein by reference.

c) All correspondence between F.H.A. and the plaintiff from April 1949 through May of 1954.

d) All change order requests made of the defendant or his predecessor by the plaintiff, concerning construction and financing North Union Heights project at Manchester, N.H.

e) All requisitions filed with the defendant or his predecessor by the plaintiff and the Worcester Federal Savings and Loan Association between August 1, 1949 and May 1, 1954 that pertain to said project.

f) The offer and acceptance of the defendant with Joseph Talamo of Worcester pertaining to the sale and purchase of project known as North Union Heights Manchester, N.H.

g) All correspondence between Joseph Talamo the alleged purchaser of North Union Heights, Manchester, N.H., and the defendant, his agents, servants and attorneys, between August 13, 1955 and December 10, 1955. This to include correspondence both ways.

h) The letter of the plaintiff dated August 16, 1955 to the defendant and all correspondence both ways between plaintiff and defendant since August 16, 1955 to December 10, 1955 including correspondence to and from the agents' servants and attorneys of the parties for said period pertaining to the said project North Union Heights.

i) Each of the inspection reports on construction progress made by F.H.A. Inspector at time of construction of said project especially reports upon which

the action of approving or disapproving requests for payments were based monthly.

j) Reports complete of progress made by the Local representative of F.H.A. to the Washington officers of F.H.A. during the period August 1, 1949 through May 1, 1954.

k) The letter of representative of F.H.A. Blauvelt to the Washington official of the defendant's predecessor concerning the progress and conduct of the construction work at the project made after special study of conditions found by him and reported to headquarters during the years 1949, and 1950.

l) The correspondence between F.H.A. and the Plaintiff regarding requests and demands for additional performance by the plaintiff over and above contract requirements.

m) All correspondence between F.H.A. and the plaintiff concerning the requirements of a rental schedule for the project both prior to the start of construction and at times when apartments were ready for occupancy at least in part although the entire project may not have been so ready for occupancy.

2) To produce and permit plaintiff to inspect and to photograph each of the following objects; The list as contained in #1.

3) To permit the plaintiff to enter the premises known as North Union Heights, Manchester, New Hampshire and to inspect and to photograph the whole or any portion of said premises designated by the plaintiff in order to produce before this court accurate photographs of the said real estate. Defendant Norman P. Mason has the possession, custody and control of each of the foregoing documents and objects and of the above mentioned real estate. Each of them constitutes or contains evidence relevant and material

to a matter involved in this action, as is more fully shown in Exhibit A attached.

GARDEN HOMES INC.
by (s) A. M. MACNEIL
Its Attorneys

Commonwealth of Massachusetts
County of Middlesex
Angus M. MacNeil being first duly sworn says:

1) That the defendant, its agents, servants and attorneys are charged by law with the possession, custody, and control of each of the documents and objects enumerated above and has to the personal knowledge of your subscriber the possession, control and custody of said enumerated documents, papers and objects.

2) That each and every item enumerated above are essential to the proper presentation of the case to this court and that many of them are essential to the proper presentation to this court of the facts and evidence on the motion to strike, motion to remand, motion concerning attachment filed herein, and for proper presentation of facts on other preliminary motions, especially to disestablish any right of the action being in this court.

GARDEN HOMES INC.
by (s) A. M. MACNEIL

Subscribed and sworn to before me this ninth day of December, 1955.

[Signed]

MOTION FOR AN EXTENSION OF TIME IN WHICH TO ANSWER THE PLAINTIFF'S REQUEST FOR ADMISSION OF FACTS BY THE ACTING SECRETARY OF THE TREASURY DAVID S. KENDALL.

Comes now Maurice P. Bois, United States Attorney, and respectfully requests an extension of time for filing an answer to the Request For Admission of Facts By the Acting Secretary of the Treasury David S. Kendall to and including the sixteenth day of January, 1956, on the grounds that the information necessary to prepare an appropriate answer has not yet been received from the Acting Secretary of the Treasury who is not presently in Washington and is not expected to return until the third day of January, 1956.

NORMAN P. MASON, *Commissioner*,
Federal Housing Administration
By MAURICE P. BOIS
MAURICE P. BOIS
United States Attorney

REQUEST FOR IMMEDIATE REMAND AND FOR ABSTENTION OF ACTION IN THIS COURT.

Now comes the plaintiff in the above entilted action and states that:

1) It appears in accordance with Title 28 of the United States Code section 1447 and the proceedings filed in this case as well as the rules of Civil Procedure that this case was improvidently removed from the State Court and removed without jurisdiction and therefore motion is made that there be compliance with the provisions of said section 1447 of Title 28 of the USC.

2) That the removal of this case was without the jurisdiction of the Court and this court having no jurisdiction of the case cannot make any legal orders pertaining thereto except an order of remand. That action on motion to vacate attachment is outside the power of this court as well as a motion to dismiss the said action is outside the power of the court.

3) That the facts admitted by the defendant by his answers filed and his failure to answer in accordance with the requirements of the Rules of Civil Procedure constitutes admission of every essential allegation of fact requiring proof to compel immediate remand to the State Courts.

4) That it appearing that the Statutes do not give to this court the power to dismiss an action improvidently removed or removed without jurisdiction but merely give the power to this court to remand said action to the State court from which it was removed, and therefore the motion of the court to dismiss the action in the absence of local counsel is beyond the power of the court.

Wherefore your plaintiff requests this court to enter an order of remand and forthwith transfer the said case to the State Courts. The plaintiff moves this court for the order of remand forthwith and moves that the Court enter no action and make no orders based upon jurisdiction in this court in the state of the proceedings filed in this case and calls the attention of the court the admissions of facts of the defendant in this action and incorporates said admissions of facts in this motion by reference.

The plaintiff submits this motion for action by the Court on the record and proceedings in the case without argument.

By its attorney

(s) A. M. MacNeil

OBJECTIONS TO REQUESTS FOR ADMISSIONS CONTAINED IN THE REQUEST FOR ADMISSION OF MATERIAL FACTS.

Defendant in the above-entitled case makes the following objections to the written request for admissions filed by the plaintiff on the eighth day of December, 1955. Objection is made to requests numbered 1 to 18, inclusive, which constitute all of the requests contained in the request for admission of material facts.

The objection is based on the ground that the request for admission of material facts seeks to obtain facts which are irrelevant to the issues involved in the case.

WHEREFORE, the defendant moves this Court for an order striking out requests numbered 1 to 18, inclusive.

NORMAN P. MASON, *Commissioner,*
Federal Housing Administration
By MAURICE P. BOIS
MAURICE P. BOIS
United States Attorney

OBJECTIONS TO REQUESTS FOR ADMISSIONS CONTAINED IN THE REQUEST FOR ADMISSION OF FACTS BY THE ACTING SECRETARY OF THE TREASURY DAVID W. KENDALL.

Defendant in the above-entitled case makes the following objections to the written request for admissions filed by the plaintiff on the thirteenth day of December, 1955. Objection is made to requests numbered 1 to 10, inclusive, which constitute all of the requests contained in the request for admission of facts.

The objection is based first on the ground that the Acting Secretary of the Treasury is not a party to the action and

therefore the request is not within the purview of Rule 36 of the Rules of Civil Procedure and the objection is made secondly on the ground that the facts sought to be admitted are not relevant to the issues involved in the case.

WHEREFORE, the defendant moves this Court for an order striking out requests numbered 1 to 10 inclusive.

NORMAN P. MASON, *Commissioner*
Federal Housing Administration
By MAURICE P. BOIS
United States Attorney

MOTION TO DISMISS.

WHEREAS, the above action commenced in the Superior Court of New Hampshire for Hillsborough County on the twenty-sixth day of July, 1955, was removed to this Honorable Court on the seventeenth day of October, 1955, and

WHEREAS, Angus M. MacNeil filed a special appearance for the plaintiff on November 15, 1955, and

WHEREAS, Angus M. MacNeil was advised by the Court on diverse occasions that his appearance in this Court could not be noted unless he associated with local counsel and further advised him in open Court on December 30, 1955, that unless he associated himself with local counsel by January 13, 1956, a Motion to Dismiss for want of prosecution would be entertained, and

WHEREAS, Angus M. MacNeil has not associated himself with local counsel,

NOW THEREFORE the defendant moves this Honorable Court to dismiss said action for want of prosecution.

NORMAN P. MASON, *Commissioner.*
Federal Housing Administration
By MAURICE P. BOIS
MAURICE P. BOIS
United States Attorney

ANSWER OF GARDEN HOMES INC. TO MOTION TO DISMISS.

Now comes The Garden Homes Inc. and for answer to Motion To Dismiss states as follows:

1) There is now pending before this court a motion for Remand and also a Motion for vacating order of removal.

2) Until these matters are acted upon by the court finally and the issue of jurisdiction of the court is determined there is no power in the court to enter any other orders.

3) That by statute the question being raised of the jurisdiction of the court in this matter the court is by law bound to settle that matetr before entering any other orders this is a requirement of statutory law.

4) There is apparent on the face of the pleadings the fact that there is no jurisdiction for removal of this case from the courts of the State of New Hampshire and therefore all action taken by this court prior to determining officially that the case must be sent back to the Superior Court is improper and contrary to law.

5) Upon such determination of the requirement for remand the court is obliged to withhold further action and remand without delay. This does not permit dismissal of action prior to said remand.

6) The failure of the plaintiff to be represented by counsel of the Bar of the Court is not fatal to its right to prosecute its claim. The plaintiff cannot be nonsuited for failure to comply until the case is assigned for trial at which time proper representation will be had.

By its attorney

(s) A. M. MacNeil

MOTION TO STRIKE OBJECTIONS TO REQUEST FOR ADMISSIONS OF FACTS.

Now comes the plaintiff in the above entitled action and moves this Court that the objections filed in this case to its request for admissions of Facts be stricken from the docket as a matter of course for the reason that the opposing side can only protect itself from admitting the facts requested is by compliance with the law and rules of Court. The defendant nor those attempting to furnish stipulation have not complied with the rules of court in attempting to object to making the said admissions by failing to file or serve upon the defendant a notice of hearing of the objections. The time for performing said act having expired the facts requested are for the purposes of this action now admitted and there are no objections as a matter of law.

GARDEN HOMES INC.
by ANGUS M. MACNEIL
its president
547 Somerville Ave.
Somerville, Mass.

MOTION FOR ENLARGEMENT OF TIME.

Now comes Maurice P. Bois, United States Attorney, and respectfully requests an extension of time for filing an answer or otherwise move with respect to plaintiff's Request For Admission of Material Facts to and including January 10, 1956, on the ground that an answer or other pleading was not filed within the specified time through accident, mistake, misfortune and the pressure of business during the trial in Tract No. A-162, Civil Action No. 1110.

UNITED STATES OF AMERICA
MAURICE P. BOIS
MAURICE P. BOIS
United States Attorney

OBJECTIONS TO ALLOWANCE OF MOTION FOR ENLARGEMENT OF TIME FOR ANSWERING DEMANDS TO ADMIT FACTS.

The defendant has no right to any enlargement of time for filing answers to requests for admissions of fact at this time as a matter of law.

The Court has no power to grant at this time on the basis of the motion presented any enlargement of time.

The defendant has not complied with the rules and laws applicable to extensions or enlargements of time within which to file answers as requested.

The defendant has not shown any evidence of any intention to file responsive answers in good faith.

No answers are attached to his motion for enlargement of time. That while the time of trial of case referred to by the defendant in his motion may possibly have been a valid excuse for failure to file on time more than ten days have elapsed since the termination of active work in said case and the requirement of answering the Requests of the plaintiff appears to have been disregarded completely by the defendant.

Wherefore your plaintiff believes that the court lacks the power to grant any enlargement of time on the basis of motion filed respectfully objects to any order purporting to grant such enlargement of time.

GARDEN HOMES INC.
by (s) A. M. MACNEIL
president

ORDER ON PLAINTIFF'S MOTION FOR PRODUCTION OF DOCUMENTS.

(March 13, 1956)

The motion is granted to the extent that the defendant is to produce and permit plaintiff to inspect and photograph the subject matter of paragraphs e, i, j, and k of the motion.

Subject to convenient arrangement by and between the parties, the plaintiff is permitted to enter the premises known as North Union Heights, Manchester, New Hampshire, and to inspect and photograph the whole or any portion designated by said plaintiff.

The motion is otherwise denied.

ALOYSIUS J. CONNOR
United States District Judge.

PLAINTIFF'S OBJECTIONS TO MOTION FILED BY DEFENDANT FOR ENLARGEMENT OF TIME FOR ANSWERING REQUESTS FOR ADMISSIONS OF FACT.

Now comes the plaintiff and objects to the hearing upon and consideration of the motion for enlargement of time for responding the Requests for Admissions of Facts for the following reasons.

1) By virtue of the Rules of Civil Procedure Rule 6 an enlargement of time can only be granted after expiration of time allowed by rule by motion made after the said expiration of the specified period stating that the failure to act within the time allotted by said rules was the result of Excuseable neglect. That the Courts of the United States have on numerous occasions stated "The fact that counsel was engaged in other matters does not show excusable neglect and would not justify action of Court." *Magham*

v. *Young*, 154 F.2nd 13.; "Even Illness is no excuse" *Creeden* v. *Traubman*, 8 F.R.D. 268.

2) The procedure of Requests for admissions of facts is planned to operate extrajudicially and the District Court will not consider application for discharge from compliance with the rule 36; See *Penmac Corp.* v. *Falcon Pencil Corp.*, 2 F.R.D. 402; *Modern Food Process Co.* v. *Chester Packing Co.*, 30 F. Supp.; *Unlandhern* v. *Park Contracting Corp.*, I F.R.D. 122.

3) The requests for admission of facts are not subject to motions to strike; See *Momand* v. *Paramount Pictures Dist. Co.*, Fed. Rules Service vol. 4 sec. 36A-54-58.

In *Jackson* v. *Katzebeen Oil Sales*, 17 F.R.D. 204; No justifiable excuse appears or is even suggested as to why interrogatories have not been answered. The party is clearly entitled to a default for failure to answer.

The Rules may not be complied with by counsel at their pleasure they must be complied with regardless. 17 F.R.D. 204.

4) The Rules require answers to be filed or not filed subject to the results set forth on the law and rules. The defendant has failed to comply with the Rules of Court. If he had the case would in all probability been defaulted, for the reason that it appears to the plaintiff that there is no real defence to this action known to the plaintiff. The plaintiff should not be subjected to trifling with the processes of this court by the defendant but compliance with the rules should be compelled. This entails a required denial of his motion for enlargement of time for answering plaintiff's requesst for admissions of fact. There being no excusable neglect and the Court as well as litigants being bound by rules of Court must deny said motion of the defendant.

5) The Requests for admission of fact is a procedure set by rule of court. The party upon whom the requests are made must admit or deny the said facts or set forth in

detail why he can't admit or deny said facts. *Bertha Building Corp.* v. *National Theaters,* 15 F.R.D. 339.

6) The choice of whether or not the defendant is to answer the Requests for facts rests upon the defendant. If he desires to omit answering them he may do so but at the cost of their being admitted to be true if they prove relevant. *N. Y. C. RR.* v. *Roderwood Industries,* 13 F. Supp. 435. See also *Martin Parry* v. *C. A. Bade,* 16 F.R.D. 465.

It therefore appearing that there was no excusable neglect alleged or proved by the defendant the motion must be denied on its merits if there is in fact or law jurisdiction of the court to entertain it.

Wherefore your plaintiff prays that the motion for enlargement of time be denied.

GARDEN HOMES, INC.
by (s) A. M. MACNEIL
President
547 Somerville Ave.
Somerville, Mass.

I hereby certify that I have served a copy of this objection upon the United States Attorney by mailing it to him at Concord, N.H., postage prepaid.

REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Now comes the plaintiff in the above entitled action and states that an application was made to the court for restraining order and injunction; That on March 12, 1956 the said motion was heard by the court and on March 13, 1956 the said application for injunction (Interlocutory) was denied. Wherefore your plaintiff respectfully prays the court for findings of fact and conclusions of law thereon all as required by rule 51a of the Rules of Civil Procedure of the District Courts of the United States. The findings of fact

and conclusions of law are those which constitutes the ground for the action of the court in denying the application for said interlocutory injunction.

GARDEN HOMES INC.
by
ANGUS M. MACNEIL
its president
547 Somerville Ave.
Somerville, Mass.

OBJECTIONS OF THE PLAINTIFF TO RULINGS OF COURT.

Now comes the plaintiff in the above entitled action and states.

1) That it objects and excepts to the rulings, decrees and orders of the Court in granting the motion of the defendant on objections to requests for admissions of material facts, said action being taken on March 21, 1956 as well as objection is had to granting of motion for enlargement of time on motion filed March 14, 1956 by the defendant.

The reasons for these objections are that said facts have long since been admitted by the defendant and the court was without power to grant said motions under the rules of Civil Procedure under which our courts operate. That the facts sought are proper material and relevant to the issues in this case and the plaintiff has as a matter of right the answers and admissions sought by said requests. If the defendant desired to deny the said facts he was at liberty so to do but he elected not to deny them.

GARDEN HOMES INC.
by (s) A. M. MACNEIL
President
547 Somerville Ave.
Somerville, Mass.

FURTHER REQUEST FOR FINDINGS OF MATERIAL FACTS.

Now comes the plaintiff in the above entitled action and states:

1) That it submitted to the court for action its motion or petition for restraining order and for injunction.

2) That in submitting to the court for action thereon the said pleading it submitted upon the record as it then stood.

3) That at the time of said hearing on said matter there were pleadings filed that clearly indicated that the court had no jurisdiction in the further consideration of the suit; that the suit should be remanded for lack of jurisdiction in the court to entertain it.

4) That the plaintiff had called upon the defendant to admit under the provisions of the rules of court rule 36 certain accepted facts.

5) The defendant has admitted each and every fact so requested either by actual admission or by failure to deny said requested facts in accordance with said rules of court. The effect of said failure to deny said facts as required constitutes an admission of said facts for the purposes of this suit.

6) That each and every fact requested to be admitted on request of the plaintiff was in fact admitted by the defendant, by failure to act or by his affirmative admission.

7) That the said facts were matters of record of which the court must take notice in acting upon the motion for restraining order and injunction.

8) That the statement of the court that said petition was submitted without offer of evidence while probably technically correct does not truly reflect the status of this matter. That the parties by their respective action on the admissions of fact sought and obtained submitted to the court agreement of facts far stronger than controverted evidence.

9) That the pleadings themselves so far as they are filed under oath are the equivalent of affidavits and in the absence of contradiction must be accepted as true.

The plaintiff objects and excepts to the action of the court in acting upon the petition for restraining order and injunction without considering said Agreements of fact represented by the undenied requests for admissions of fact and sworn pleadings that are uncontradicted, as well as the action taken by the court on said petition.

Wherefore your plaintiff respectfully moves reconsideration of said petition upon the proof of fact apparent in the record and called to the attention of the court heretofore.

GARDEN HOMES INC.

President
547 Somerville Ave.
Somerville, Mass.

APPEAL TO COURT OF APPEALS FOR THE FIRST CIRCUIT UNDER RULE 73(b).

Notice is hereby given that Garden Homes Inc., plaintiff in the above entitled action, hereby appeals to the United States Court of Appeals for the First Circuit from the following orders entered in this action on March 13 and 14, 1956.

1) Denial of plaintiff's motion to strike petition for removal.

2) Denial of plaintiff's motion to strike petition to remove action.

3) Allowance of defendant's motion for extension of time in which to answer plaintiff's request for admission

of facts by the Acting Secretary of the Treasury David S. Kendall.

4) Denial of plaintiff's request for immediate remand and for abstention of action in this court.

5) Granting of defendant's motion that the time for filing an answer be extended.

6) Denial of plaintiff's motion for production and copying of documents to the extent said motion was denied.

7) Order of Court for hearings on March 21, 1956 of motion to strike defendant's motion for order vacating attachment and stipulation and

8) Order of Court setting for hearing defendant's motion for enlargement of time for filing answer to plaintiff's request for admission of material facts for March 21, 1956.

9) Amendment order of court striking out of previous order words "Time extended to March 23, 1956".

10) Denial of plaintiff's petition for restraining order and injunction.

GARDEN HOMES INC.
by
ANGUS M. MACNEIL.
president
547 Somerville Ave.
Somerville, Mass.

No. 749

No. 5262.

Office - Supreme Court, U.S.
FILED
JAN 27 1958
JOHN T. FEY, Clerk

United States Court of Appeals

For the First Circuit

GARDEN HOMES, INC.,

PLAINTIFF, APPELLANT,

v.

NORMAN P. MASON, Commissioner,
Federal Housing Administration,

DEFENDANT, APPELLEE.

RECORD APPENDIX
TO
BRIEF FOR THE APPELLANT.

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DOCKET ENTRIES.

* * *

1956

Apr.	2	Order, Connor, J., that plaintiff is to provide counsel conformably to Rule 4 of this Court within five days from the date of this order.
	9	Defendant's Motion to Dismiss, and Certificate of Service.
	16	Hearing is had on defendant's motion to dismiss. No appearance for plaintiff — letter from Angus M. MacNeil. Taken under advisement. Connor, J.
May	11	Certified copy of Order of C.C.A. granting leave to Garden Homes, Inc. to file bond for costs on appeal in amount of $250., with Clerk of District Court on or before May 17, 1956; Clerk to forward certificate after filing, or failure to file same.
	15	Bond for Costs on Appeal in amount of $250., Fidelity & Deposit Company of Maryland, surety. (Certificate sent Clerk, C.C.A.)
	17	Receipt of A. M. MacNeil for money sent in letter of May 12, 1956, in amount of (illegible)
	17	Receipt of A. M. MacNeil, Individually and as President of Garden Homes, Inc., showing photostatic copies of subject matter furnished by the Government with attached sheets entitled Exhibits A, B, C, D, E, and F.
June	5	Rescript on Orders on Motion of Plaintiff and Motion of Defendant, filed as of March 23, 1956.
	14	Plaintiff's motion for vacation of order prohibiting appearances, and Certificate of Service.
July	10	Defendant's Motion to Dismiss denied without prejudice. Connor, J.
Dec.	4	Opinion of the Circuit Court of Appeals that order will be entered dismissing appeal for lack of jurisdiction, entered December 3, 1956.

1956

20 Mandate from the Circuit Court of Appeals ordering that appeal be and the same hereby is dismissed for lack of jurisdiction, on December 3, 1956.

1957

Jan. 3 Hearing is had on plaintiff's motion for vacation of order prohibiting appearances. Counsel does not desire to press. Connor, J.

14 Order for Trial on March 4, 1957, at 11 A.M., Connor, J.

Feb. 21 Plaintiff's Motion for Remand, and Certificate of Service.

21 Plaintiff's Motion to Decline Jurisdiction, and Certificate of Service.

26 Plaintiff's Motion to Remand for Lack of Jurisdiction, and Certificate of Service.

Plaintiff's Motion for Remand for Reasons of the Law of the Case, and Certificate of Service.

Mar. 2 Plaintiff's Motion for Remand, and Certificate of Service.

2 Plaintiff's Motion for the taking of Judicial Notice and Certificate of Service.

4 Plaintiff's Motion for Remand, and Certificate of Service.

4 Motion of Plaintiff for taking of Judicial Notice, and Certificate of Service.

6 Case is called for trial. Maurice P. Bois, U.S. Attorney appeared for defendant; no one present to represent plaintiff. Clerk read into the record letter of March 1, 1957, notifying plaintiff of date and time of trial. Defendant orally moved to dismiss with prejudice under Rule 41. Motion granted. Connor, J.

1957

8 Reporter's transcript of hearing on March 6, 1957.

14 Judgment, Connor, J., dismissing action on merits and that defendant recover his costs. (Copies to Garden Homes, Inc., 547 Somerville Ave., Somerville, Mass., and Maurice P. Bois, Esq., U. S. Attorney).

ORDER VACATING ATTACHMENT.

Whereas in an action at law commenced in the Superior Court of New Hampshire for Hillsborough County, by a writ dated July 26, 1955, the plaintiff, Garden Homes, Inc., attached certain real estate of the defendant Norman P. Mason, Commissioner, Federal Housing Administration, on September 19, 1955; and

Whereas a Petition for Removal was filed in the United States District Court for the District of New Hampshire on October 17, 1955; and

Whereas Maurice P. Bois, United States Attorney for the District of New Hampshire, was on November 25, 1955, authorized by David W. Kendall, Acting Secretary of the Treasury, to stipulate for the discharge of said real estate from the lien of said attachment; and

Whereas Maurice P. Bois on December 5, 1955, stipulated and agreed for the benefit of Garden Homes, Inc. that the said Garden Homes, Inc. shall upon the discharge of said attachment become entitled to all the benefits of sections 308 and 309 of Title 40 of the United States Code; and

Whereas Maurice P. Bois on December 5, 1955, filed a motion for order vacating attachment which motion was granted on March 23, 1956; and

Now, Therefore, conformably to the order granting said motion for order vacating said attachment, it is ordered that said attachment is hereby vacated and the real estate

of the defendant Norman P. Mason, Commissioner, Federal Housing Administration is hereby discharged and released from the lien of said attachment and the defendant, Norman P. Mason, Commissioner, Federal Housing Administration shall forthwith cause a certified copy of this order to be recorded in the Registry of Deeds for the County where said real estate is situated.

Entered this twenty-sixth day of March 1956.

ALOYSIUS J. CONNOR
United States District Judge

ORDER FOR TRIAL.

(January 14, 1957.)

ORDERED; That the above case will be in order for trial on March 4, 1957 at eleven o'clock in the forenoon.

Signed (Judge District Court)

MOTION FOR REMAND.

Now comes the plaintiff in the above entitled action and states;

1) That this action was brought in the Superior Court for Hillsborough County State of New Hampshire;

2) That the defendant was not served with process in said Court and therefore did not become subject to the jurisdiction of said court.

3) That the jurisdiction of the defendant in a removed case is a derivative jurisdiction and the State Court of New Hampshire not having any jurisdiction over the person of the defendant and more especially for the reason that he specifically declined to appear before said court and advised said court that he was not submitting to the jurisdiction of the State Courts, said State Courts never had any jurisdiction over the defendant personally or as Commissioner of Federal Housing Administration and

therefore the Federal Courts have no derivative jurisdiction over the defendant in this action.

4) That the defendant is not subject to the jurisdiction of the United States District Court for the District of New Hampshire in this an allegedly removed case.

5) That the defendant sought successfully to have this court enter an order purporting to dissolve the attachment made in this action of the property of the defendant, Specifically denying that the court had the jurisdiction to dissolve said attachment or in fact and law ever did dissolve said attachment, yet the accomplishment of the defendant in effecting the court to enter an order so purporting, removed any possibility of any jurisdiction of this court, over the defendant or his property.

6) That the plaintiff brought this action for the purpose of effecting a foreign attachment in aid of a pending suit in the Suffolk Superior Court at Boston, Massachusetts and for that purpose principally.

7) That the issues between the parties on their merits are before the Superior Court of Suffolk County in suit 65912 entered in said court in 1952 and pending thereafter and still pending at said court except for a brief period during which the defendant attempted removal to the District Court of the United States for the District of Massachusetts and thereafter remanded by said court in accordance with the United States Laws applicable thereto by orders of Aldrich, J.

8) That the defendant appeared in said suit as well as did his predecessors and certain agreements were made in said suit between the parties.

9) That said suit being pending between the parties at the time this suit was instituted and thereby was improper if duplicitious of this action, this action should abate if the said suit is for the same cause of action. However, if this action is for the purpose of affording security to the plain-

tiff as appears herein the said action becomes ancillary to that aforementioned in the Superior Court for Suffolk County. That these are the facts pertaining to said action.

10) That the necessary parties are not before this court for determination and proper adjudication of the issues between the parties as they exist.

11) That the Worcester Federal Savings and Loan Association is an essential party to the proper and full determination of the rights of the parties to this action and said Association is not within the judicial District of this court and not subject to its processes to be made party.

12) That the rights of the parties have undergone many changes since action was brought herein and the pleadings in this action do not set forth the rights of the parties as claimed by said parties against the other.

13) That no complete and adequate pleadings distinctly setting forth the issues between the parties appear in the records of this court.

14) That the issues between the parties being now the subject of litigation in a court of competent jurisdiction in the Superior Court for Suffolk County a court with undisputed jurisdiction of all necessary parties, there appears no occasion for trial or existance of this action before this court.

15) That all of the issues between the parties those represented as before this court as well as all other parties at interest appearing and responding to the prior suit there appears no occasion for continuance of this action on the dockets of this court.

16) That by the statutory laws of the United States, this court is obligated to remand to the State Court from which this action was removed upon discovery that it was removed improvidently or without jurisdiction therefore.

17) That the Court of Appeals for the First Circuit in case 5099 determined and adjudicated that there could not

be jurisdiction of the defendant in action by the plaintiff upon removal to the District Court of the United States in the absence of sufficient and valid service of process. That in this action there has been no service of process in the state court as against the defendant and further he specifically notified the said court that he was not appearing even specially for purposes of removal in order to assure that he would not under any circumstances become subject to its jurisdiction, thereby conclusively depriving this court of all derivative jurisdiction over him. Said derivative jurisdiction being a requisite for valid removal.

18) That all grounds for remand claimed hereinbefore are insisted upon and in no way waived.

19) That the directions of the Court of Appeals in case 5099 are determinative of the lack of jurisdiction of the Court herein of the defendant and require that the court direct that this action be remanded.

20) That the adjudication of this action will not settle any issues between the parties and therefore continued retention of this action by the United States District Court is improvident.

20) Your plaintiff herein appears specially and does not submit to the jurisdiction of this Court and appears solely for the purpose of raising before this court the fact that there is no jurisdiction of the Court on the removal of action from the State Courts and for the purpose of moving for remand.

21) Wherefore in as much as it appears that this action was removed from the State Courts of New Hampshire improvidently and without jurisdiction therefore, the plaintiff herein moves for remand to said State Courts, and further moves for vacation of order allowing amendment to pleadings for matter not offered to this court for allowance by plaintiff and not filed in this court by plaintiff and which

does not set forth the claims of the plaintiff as against the defendant made herein.

GARDEN HOMES, INC.
by its president,
547 Somerville Ave.
Somerville, Mass.

Copy of this motion is hereby sent by first class mail to the defendant through the United States Attorney at Concord, N. H. postage prepaid.

[Copy]

UNITED STATES DEPARTMENT OF JUSTICE

United States Attorney
District of New Hampshire

Concord, N. H.
October 21, 1955

Arthur S. Healy, Clerk
Hillsborough County Superior Court
Nashua, New Hampshire

Dear Mr. Healy:

In re: Garden Homes, Inc. v. Norman P. Mason
as Acting Commissioner,
Federal Housing Administration

After our telephone conversation Tuesday evening I gave the matter of filing an appearance in the Garden Homes case some thought. Washington had definitely instructed this office not to file an appearance in your court in order not to jeopardize our refusal to submit to state court jurisdiction. We would, therefore, prefer not to file even a special appearance for the purpose of removal as suggested by you.

This office wants to cooperate in any way possible and if you still feel that an appearance should be filed, I will

then write to Washington and get their viewpoint on the matter.

We trust you will find this satisfactory.

Very truly yours,

MAURICE P. BOIS

MAURICE P. BOIS
United States Attorney

MPB:mwh

MOTION TO DECLINE JURISDICTION.

Now comes the plaintiff and appears specially and does not submit to the jurisdiction of this court and appears solely for the purpose of questioning the jurisdiction of the Court in this matter states:

1) That the plaintiff has pending a prior action that will adjudicate the issues raised personally with the defendant in one proceeding now pending before the Superior Court of Suffolk County, Massachusetts, a court of competent jurisdiction in case 65912 eq.

2) That the proceedings anticipated herein will be duplicitous of said proceedings and unnecessary.

3) That this court lacks jurisdiction of the defendant as well as of another necessary party and further lacks jurisdiction of the subject matter in issue between the parties in great measure.

4) That a Court of the United States has ordered the said suit 65912 at Suffolk Superior Court remanded to said court for adjudication and disposition and therefore said decree of remand is an adjudication that the said court is the proper court for disposition of the issues between the parties.

5) That by the rules of comity between the State and federal Courts the Court first acquiring the issues for disposition is not to be interfered with by the Courts of the other if both courts have concurrent jurisdiction therein as appears in those matters.

6) That by rule of comity the District Court for the District of New Hampshire is obligated to relinquish jurisdiction of these issues to the Superior Court of Massachusetts, the court first acquiring jurisdiction of all necessary parties as well as of the subject matter of the controversy between the parties.

7) That the forum most convenient for all parties is that of the Superior Court of the Commonwealth of Massachusetts.

8) That the District Court for the District of New Hampshire does not have subject to its jurisdiction the necessary parties for complete adjudication of the rights of the parties to this controversy nor does it have jurisdiction of the entire subject matter of the said controversy between the parties.

Wherefore your plaintiff denies jurisdiction of the Court and respectfully moves the court to decline jurisdiction to adjudicate the issues between the parties at least so long as the suit at Suffolk Superior Court Massachusetts between the parties and the Worcester Federal Savings and Loan Association is pending.

GARDEN HOMES INC.
by its president

Copy mailed to the U. S. Attorney at Concord, N. H.
GARDEN HOMES INC.
by president

MOTION TO REMAND FOR LACK OF JURISDICTION.

Now comes the plaintiff in the above entitled action and states that:

1) The pleadings filed by the plaintiff namely the original writ, was filed for the purpose of effecting a foreign attachment of property of the defendant for security for a decree or judgment anticipated to be recovered in the bill

in equity pending between the parties and others in the Superior Court for Suffolk County Massachusetts case numbered 65912, pending since August 1952 at said court.

2) That the plaintiff never had any intention of transferring said litigation basically pending in said Superior Court to any other court for disposition.

3) That the plaintiff submitted his cause of action for complete adjudication to said court a court of competent jurisdiction over the parties and over the subject matter of the basic litigation and claim as well as over the parties not joined herein this action but essential parties for complete and fair adjudication of all issues between the parties to this action.

4) That said court is the only court of full and competent jurisdiction over all parties necessary for full determination of the issues between the parties and the subject matter as well.

5) That the District Court of the United States for the District of New Hampshire is without jurisdiction for reasons hereinbefore stated in other motions for remand, all of which reasons are maintained and in no manner waived, but the more especially for the reason that this court does not have jurisdiction of issues for determination against which the statutes of limitation of action have rendered not subject to litigation the time for instituting action having passed prior to institution of these proceedings before this court. That while the said statutes may not in some issues preclude the State Courts of New Hampshire from hearing and determining upon merit the same contention may not prevail as to matters in this court. The law of the forum prevailing in matters of limitation of actions rather than the law of the domicile of the parties or that of the making of the agreements or the place of their performance. That as the result thereof the said Court herein

lacks jurisdiction of essential issues in this matter for determination.

6) That once the time for limitation of action has expired the Court is powerless to revive the right to prosecute said claim in the said court.

10) That all issues are properly before other tribunals of competent jurisdiction and the said jurisdiction is far more complete than that of this court and the pleadings have progressed far beyond the stage they have reached in the New Hampshire Courts, state or federal, so that the said New Hampshire Courts are obligated to defer to the jurisdiction of the Superior Court of Massachusetts in these matters.

11) That the United States District Court for the District of New Hampshire is a branch of the United States Judiciary and judicial system which has heretofore determined beyond all possibility of review that the said issues should be disposed of in the State Courts of Massachusetts by action of the District Court of the United States for the District of Massachusetts. That by said decree of remand the United States Courts have established the law of this case to the effect that it should be disposed of in the State Courts.

12) That the amendment heretofore entered upon the docket of this court as allegedly offered by the plaintiff and allowed by the Court in March 1956 was not in fact ever offered for filing by the plaintiff in this court and therefore the said motion never became a part of the official record of the case, and further has never been offered to the court for allowance and again therefore did not become a part of the pleadings herein and could not prior to presentation for allowance and actual allowance. Presentation for allowance has not been accomplished as yet. That the said motion to amend does not correctly set forth in accordance with the rules of court the issues between the

parties herein and should not have been allowed and for which allowance was never requested.

Wherefore your plaintiff moves for:

1) The striking of the said allowance of the motion to amend and the vacating of the order allowing the amendment heretofore;

2) For determination of this court as required by law, to the effect that jurisdiction of the parties as well as jurisdiction of the cause of action of the issues between the parties is lacking;

3) That this Court so required by the statutes of the United States Title 28 section 1447 order remand of this action to the State Courts from which it was removed improvidently.

4) That this Court record the appearance herein of the plaintiff solely as special and denying the jurisdiction of the Court, for the sole purpose of obtaining remand to the state courts of this action.

5) That this court order said remand on the basis of the facts herein contained to which the judicial notice of the Court is directed for proof as well as on the basis of the other facts set forth in prior motions for remand sent to the clerk of court for filing, none of which are waived but reliance is placed upon each and every such ground as set forth as proper cause for remand.

GARDEN HOMES, INC.
by its president

Copy mailed to U.S. Attorney at Concord, N. H. 2-20-57, A.M.M.N. for G.H.I. Hearing upon this motion is requested and action upon it is also requested by the Court.

MOTION FOR REMAND FOR REASONS OF THE LAW OF THE CASE.

Now comes the plaintiff and appears specially and does not submit to the jurisdiction of the Court but appears for

the sole purpose of pressing and filing this motion for remand and states;

1) That it does not waive any of the grounds heretofore made known to the court upon which remand is sought and required;

2) That the issues raised herein are subject to the basic suit between the parties hereto at the Superior Court for Suffolk County, Massachusetts; a court of competent jurisdiction having full service of all necessary parties as well as of the subject matter;

3) That said basic case was removed to the District Court of the United States for the District of Massachusetts and said Court ordered remand to the Superior Court for Suffolk County.

4) That the said decree of remand cannot become subject of appeal by virtue of the United States Statutes nor of review by any court.

5) That the continuance of this action before the Federal Court of New Hampshire is in effect an attempted review of said action of the federal court of Massachusetts, and beyond the powers of said court.

6) That the United States District Court for the District of New Hampshire is not a court of appellate jurisdiction over the judgments of the United States District Court for the District of Massachusetts and therefore it cannot reverse or modify the judgments and orders of said court.

7) That the law of the case to the effect that the issues between these parties are to be heard and disposed of by the Superior Court of Massachusetts has been firmly established by the said orders of the United States Court for the District of Massachusetts and final conclusive and binding upon the parties hereto.

8) The attempt to avoid remand of this case by the defendant Mason is in conflict with the law of this case already adjudicated by said orders of remand in so far as

the determination of the forum for trial and disposition is involved.

9) That the United States District Court for the District of New Hampshire is bound by the prior adjudications between the parties of the matters involved in this action and cannot disregard prior actions determinations decrees and judgments of other courts of competent jurisdiction even though in conflict with adjudications or orders contemplated by this court.

10) The actions and orders and decrees in the case 65912 eq at the Suffolk Superior Court, Massachusetts entered by the Federal Court in Massachusetts prior to remand and subsequent to removal are binding upon this court as to right of removal and therefore this court cannot enter any orders judgments or decrees which conflict with those of said court.

11) That by the very action of remand by the federal court of Massachusetts the defendant is now estopped from making any claim that the first knowledge of the claim for which recovery is sought was within twenty days of removal and must be bound by the service of process made in 1952 upon his predecessor in said office to which service he appeared before the Superior Court of Massachusetts. Said knowledge precludes removal of this case.

Wherefore your plaintiff moves for a finding of lack of jurisdiction in this court and for immediate orders of remand.

GARDEN HOMES, INC.
by president

Copy of this motion mailed to U.S. Attorney at Concord, N. H.

G. H. I.
by president

The Court is requested to take judicial notice of the pleadings and record in case 65912 eq at Suffolk Superior

Court and of the U.S. Court for Massachusetts for period during which said case was there pending in proof of above allegations.

G. H. I.
by pres.

MOTION FOR THE TAKING OF JUDICIAL NOTICE.

Now comes the plaintiff appearing specially and not submitting to the jurisdiction of the Court but for the purpose of making known to the Court the existence of matter that may determine the action of the Court upon motions for remand heretofore filed and for the purpose of submitting incontrovertible proof of facts contained in said Motions for Remand states to the Court that the issues contained in the present case upon merit are those set forth in case 56,466 at the United States District Court for the District of Massachusetts, which said case was remanded to the State Courts of Massachusetts. The said case was between the parties hereto as well as against the Worcester Federal Savings and Loan Association a necessary party to complete adjudication of the controversy between the parties hereto. The said case was acted upon by the said United States District Court for the District of Massachusetts and is reported in 143 Fed. Supp. 144. That the case before this court now upon motion for remand is merely ancillary to said case #56,466 at the federal court of Massachusetts. That the parties are fully before said court and the determination of said Court in remanding to the Courts of Massachusetts constitutes the law of the case between the parties both as to the main case and as to the ancillary case. Both cases rise or fall upon the said determination of the Massachusetts Courts, and the order of remand is final conclusive and binding upon the parties.

The District Court of the United States for the District

of New Hampshire would in effect be causing a splitting of a cause of action and a presentation in piecemeal fashion by the retention of this case in violation of the laws determined effective in *Sutcliffe Storage & Warehouse Co. Inc. v. U. S.*, 68 Fed. Supp. 446; 162 F.2nd 849; The Court is limited in its power to annul the decree of remand entered by another court of the United States in Mass. 56,466 and the court for the District of New Hampshire having been notified that the courts of Massachusetts had taken jurisdiction of the entire controversy between the parties and said jurisdiction being restored after removal to the District Court for Massachusetts, the District Court of The United States for the District of New Hampshire is bound by the said decrees and is obligated to respect the jurisdiction of the State Courts of Massachusetts.

Wherefore your plaintiff moves that this Court take judicial notice of the cases mentioned herein and especially of those contained in the official reports. That the said notice be accepted as binding upon the actions of this Court in its consideration of the motions for remand.

By its attorney

Copy mailed to U.S. Attorney at Concord, N. H.

MOTION FOR REMAND.

Now comes the plaintiff and appearing specially and not submitting to the jurisdiction of the Court moves for orders for remand to the State Courts for the reasons set forth in *RR. Comm. v. Pullman Co.*, 312 U.S. 496, 500 et seq. especially, "These cases reflect a doctrine of abstention to our federal system whereby the federal courts, "exercising a wise discretion" restrain their authority because of "scrupulous regard for the rightful independence of the state governments" and for the smooth working of the federal judiciary." See cases cited.

2) For the reasons set forth in *Weeks v. F & C Co.*, 218

F.2nd 503; "If the state Court has no jurisdiction, the federal court acquires none. *Lambert Run Coal Co. v. B. & O. R. Co.*, 258 U.S. 377. When an action over which a state court has no jurisdiction is removed to the district court, the district court acquires no jurisdiction upon removal, even though it would have had jurisdiction, if the action had originally been brought in the district court since by lack of jurisdiction there was no action in the state court, and hence no action which could be removed to the district court, *Bee Mach. Co. v. Freeman*, 131 F.2nd 190, 1st Cir. 319 U.S. 448.

The case prior thereto; Where lack of jurisdiction in the federal court is based on lack of jurisdiction in the state court the case should be remanded rather than dismissed. Under the former removal statute, which contained provisions authorizing dismissal or remand, a dismissal was usual. However the present statute contains provision only for remand to the state court and we think that a remand is the proper procedure, cases cited."

3) As it is clearly apparent that the agreements upon which the case depends for validity originally was made between the parties and the Worcester Federal Savings and Loan Association and said corporation is a necessary party to the determination of all issues and the cause of action, and is not before the court and no separate and independent claim is made by the plaintiff against the defendant herein the case was not removable. See *American Fire and Cas. Co. v. Finn*, 341 U.S. 6, 9. The old section prior to section 1441c made removable a suit in which a controversy wholly between parties which is removable may be removed, but the new act and section requires that not only must there be severable issue but the cause of action must be separate and independent and may not be joined as a part of another controversy if removable. There is no cause of action here which may be fully determined

between the parties without determining matters not removable. That the lack of the Bank to these proceedings prevents removability of the present action. "A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show."

Wherefore your plaintiff moves for orders of remand to the state court and requests the court to take judicial notice of the decisions mentioned herein as well as the records of the cases heretofore heard by the Courts of the United States between the parties as well as admissions of the parties. Prior motions for remand are not waived hereby but vigorously pressed.

GARDEN HOMES, INC.
by president

Presentation of all motions to the court for allowance and orders for remand is hereby requested and made in the absence of the plaintiff personally.

GARDEN HOMES, INC.
by president

Copy mailed to U.S. Attorney at Concord, N. H.
G. H. I.
by A. M. M. X.

MOTION OF PLAINTIFF FOR TAKING OF JUDICIAL NOTICE.

Now comes the plaintiff in the above entitled action and states that it appears specially and does not submit to the jurisdiction of the Court and appears for the sole purpose of prosecuting its several motions for remand to the State Courts of New Hampshire and notifies the Court and directs the attention of the Court to the existence of suit 56,466 formerly before the United States District Court for the District of Massachusetts and remanded by said Court for trial and disposition to the Superior Court of the Commonwealth of Massachusetts in 1956 and said decision is

reported in 143 Fed Supp. 144 and numbered 6591Z at the Superior Court for Suffolk County Massachusetts. That the said United States District Court for the District of Massachusetts entered a decree of remand which is the equivalent of a judgment upon facts alleged by the said defendant Mason against said defendant. That thereafter the said Mason filed a demurrer on two occasions to the said bill in equity and appeared generally before the Court and argued the said demurrers and the said Court has decided against the said demurrers of said defendant Mason in matters arising out of the same cause of action now claimed to be pending before the United States District Court for the District of New Hampshire case 1603. That the defendant Mason appeared generally before the Superior Court of the Commonwealth of Massachusetts and filed a plea in bar so called, produced evidence claimed to be in support of said plea and submitted the issues to said Court for determination adjudication and decree as well as judgment. That said Superior Court made its orders and findings in reference to said plea in Bar upon the reception of the evidence submitted on February 28, 1957. That a copy of the said decree on demurrer as well as a copy of the Order and Findings on the Plea in Bar in said case are attached hereto to the original of this motion, that the Courts are on holiday on March 2, 1957 the date of transmission of this motion and attested copies are not available in time for presentation to the District Court of the United States for the District of New Hampshire before the date the court has scheduled this case for trial upon merits. That the copy attached hereto is the copy actually received from the Superior Court on this date. That the plaintiff hereby moves this court to take judicial notice of the proceedings before the United States District Court for the District of Massachusetts in case 56,466 between the parties hereto containing matter subject of litigation

now injected into this case but without request of the plaintiff hereto by presentation of request or motion therefore to this court, 2) To the decrees of the Superior Court of the Commonwealth of Massachusetts in the suit between the present parties numbered 65915 at the Suffolk Superior Court entered February 28, 1957, 3) The Findings and order on Plea in Bar etc. entered by the Court in said suit on February 28, 1957, in proof of the allegations of fact contained in the motions for remand heretofore filed with this court by the plaintiff.

GARDEN HOMES, INC.
by president

Copy mailed to U.S. Attorney at Concord, N. H.
G. H. I.
by pres.

MOTION FOR REMAND.

Now comes the plaintiff in the above entitled action and states that it appears specially and does not submit to the jurisdiction of the court and appears for the sole purpose of effecting remand of this case and further states:

1) That the Superior Court for Suffolk County Massachusetts, took jurisdiction of the res involved in this action long prior to the institution of this action in the Superior Court for Hillsborough County, N. H.

2) That by the doctrine of lis pendens the said courts jurisdiction in said suit is to be protected by all other courts and none is to take jurisdiction that will interfere with the jurisdiction of the Superior Court of Massachusetts in case 65912 (at one time known as case 56,466 at the United States District Court for the District of Massachusetts).

3) That ample and adequate notice of the pendency of said suit was given prior to the commencement of proceedings herein by recordings at the Registry of Deeds of Hills-

borough County, Nashua, N. H. to all parties in interest and to the public generally.

4) That said suit taken together with notices recorded with said registry and actual notices sent to and received by the parties herein in interest and the application of the accepted doctrine of lis pendens deprived this court of any possible jurisdiction of this action.

5) The filing and prosecuting of this motion for remand does not waive or modify all previous motions and petitions and prayers for remand of this action, but they are specifically relied upon.

Wherefore, your plaintiff, moves for remand of this action to the Superior Court of Hillsborough County, New Hampshire.

Judicial notice of said facts requested.

GARDEN HOMES, INC.
by president

Copy of this motion mailed to U.S. Attorney at Concord, N. H.

G. H. I.
by pres.

Commonwealth of Massachusetts

Suffolk, ss. Superior Court in Equity

65912

Garden Homes, Inc.,

v.

Norman P. Mason, as he is Commissioner of Federal Housing Administration and Worcester Federal Savings and Loan Association

Findings and Order on Plea in Bar of respondent Norman P. Mason as he is Commissioner of Federal Housing Administration.

Part One

SUMMARY OF BILL OF COMPLAINT.

The present bill of complaint consists of an amended bill of complaint which was attached to a motion to amend bill of complaint allowed on May 23, 1956. (Document bearing serial No. 36) This amended bill of complaint contained allegations in paragraphs numbered from 1 through 62, with several numbers being used on two different paragraphs; it contained prayers numbered 1 through 16. By a motion to amend bill of complaint allowed on August 20, 1956. (Document bearing serial number 59) additional allegations were made in new paragraphs numbered 70 through 98. The present status of the Bill of Complaint as amended appears to be such that there are no paragraphs numbered 63 through 69. (There follows a statement of what appear to be the principal claims of the Petitioner as alleged in the bill of Complaint, in its present status and of the relief which the Petitioner seeks, etc.

[Same case, title omitted]

INTERLOCUTORY DECREE OVERRULING TWO DEMURRERS OF RESPONDENT NORMAN P. MASON.

This cause came on to be heard and was argued by counsel; and thereupon, upon consideration thereof, it is Ordered, Adjudged and Decreed that the demurrer of the respondent Norman P. Mason filed on July 2, 1956, and the demurrer of the same Respondent filed on September 4, 1956, both be and hereby are overruled.

Francis J. Quirico, J.S.C. 2-28-57

JUDGMENT

(March 14, 1957)

This cause came on to be tried upon assignment and after written notice to parties and the plaintiff failed to be present to prosecute the claim alleged in the complaint, and because the plaintiff failed to comply with the order of Court setting the case for trial by jury at Concord, New Hampshire, on March 6, 1957, and the Court having granted the oral motion of the defendant to dismiss said action with prejudice,

It is hereby Ordered, Adjudged and Decreed: That the action be and it hereby is dismissed on the merits, and that defendant recover his costs.

Aloysius J. Connor
United States District Judge

NOTICE OF APPEAL TO COURT OF APPEALS UNDER RULE 73(b).

Notice is hereby given that Garden Homes, Inc. plaintiff in the above entitled action hereby appeals to the United States Court of Appeals for the First Circuit from the judgment dismissing the action entered on or about March 14, 1957 entered in this action and seeks review of the

several orders on interlocutory matters entered by the Court and from those matters submitted to the Court upon which he failed to act but which were material and should be decided before the court could properly adjudicate dismissal of the action with prejudice, especially the denial or disregard of each and every motion filed for remand of this action to the Courts of the State of New Hampshire. Each of said motions to remand as filed by the plaintiff is incorporated herein by reference, also from amendment to complaint allowed March 13, 1956 also from all orders subsequent to denial of remand March 13, 1956.

GARDEN HOMES, INC.
by its attorney
547 Somerville Ave.
Somerville, Mass.

Copy mailed to United States Attorney at Concord, N. H.

RESCRIPT ON ORDERS ON MOTION OF PLAINTIFF AND MOTION OF DEFENDANT.

This is an action at law commenced July 26, 1955, in the Superior Court of New Hampshire for the County of Hillsborough, wherein the plaintiff attached certain real estate of the defendant, Norman P. Mason as Acting Commissioner of the Federal Housing Administration. On October 17, the action was removed to this court. 28 U.S.C. 1446.

Asserting the authorization of the Honorable David W. Kendall, Acting Secretary of the Treasury, as provided by 40 U.S.C. 308, the United States Attorney for this district filed a unilateral stipulaion for the discharge of the attachment, and on the same day moved that the attachment be vacated. The plaintiff then moved "to strike defendants motion for order vacating attachment and stipulation."

The questions posed are (1) whether the filing of this

stipulation is within the contemplation of the statute, and (2) whether, with the plaintiff opposing such filing and motion to vacate, the judgment of the court may be invoked.

The implication of the statute is that a stipulation would be entered into by and between the district attorney and the attaching creditor, with a release to follow, without resort to judicial aid. The fact that this stipulation is unilateral does not negate its validity. The term "stipulation" ordinarily connotes an agreement entered into by the parties in litigation. But this need not be necessarily so. The practice followed in Admiralty, while not strictly in point, is one which indicates the use of unilateral stipulation as a mode of releasing property from custody. Admiralty Rules: Rule 6.

There are substantially no precedents which would guide the court, and, if the movant is entitled to relief, the determinative factors would seem to be by analogy with accepted procedures authorizing judicial intervention in dealing with like matters. Both federal and local laws provide means in private litigation by which an owner, with the approval of the court, may obtain the release of his property upon the filing of a bond or stipulation as security. 28 U.S.C. 2464; New Hampshire RSA 511:48. These statutes may be distinguished from the one under consideration in that they specifically invoke the power of the court. However, the failure of Section 308 to spell out similar jurisdiction should not be a bar to the right of the defendant whose interest in real estate has been seized. The application of elementary principles of equity and justice demands that one whose real estate has been attached be permitted to substitute full security to meet any judgment which might be obtained. Otherwise, irreparable damage may be incurred by the inability of the defendant to make use of or to dispose of his property advantageously.

The case at bar presents a special situation. The United

States cannot allow its property to be encumbered for an indefinite period, or else the smooth and continued functioning of the machinery of government may be endangered. The procedure which it seeks to utilize would obviate this danger, and this court cannot believe that Congress did not intend that a unilateral stipulation could be put into effect where justice requires.

Orders were this day entered, granting defendant's motion to vacate and denying plaintiff's motion to strike.

March 23, 1956. ALOYSIUS J. CONNOR
United States District Judge

OBJECTION, EXCEPTION OR APPEAL TO THE COURT OF APPEALS FOR THE FIRST CIRCUIT.

Now comes the plaintiff in the above entitled action and objects, excepts and appeals to the Court of Appeals for the First Circuit from the orders and decrees of the Court refusing to grant the motions for remand filed prior to date of scheduled trial so called, also from implied decree of court denying the said motions for remand heretofore filed with the Court and the orders and decrees of Court allowing the motion of the defendant for dismissal of this action with prejudice on March 6, 1957. Also appeal is taken to the Court of Appeals for the First Circuit from the orders of Court ordering this case for trial upon merit thereby denying motions for remand by implication if not by express orders or decrees.

GARDEN HOMES, INC.
by president

Copy of this pleading mailed to the United States Attorney at Concord, N. H. first class mail postage prepaid.
president

ANSWER.

Comes now Norman P. Mason, Commissioner, Federal Housing Administration, Defendant, through Maurice P. Bois, United States Attorney for the District of New Hampshire, in answer to plaintiff's complaint and denies each and every allegation contained in the declaration attached to plaintiff's motion to amend the writ.

NORMAN P. MASON, *Commissioner,*
Federal Housing Administration
By MAURICE P. BOIS
MAURICE P. BOIS
United States Attorney

March 27, 1956

I hereby certify that a copy of the foregoing answer was this date mailed to Angus M. MacNeil, Esq., Garden Homes, Inc., 547 Somerville Avenue, Somerville 43, Massachusetts.

MAURICE P. BOIS
United States Attorney

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
JAN 27 1958
JOHN T. FEY, Clerk

Supreme Court of the United States

No. 749

GARDEN HOMES, INC.,

Petitioner,

—v.—

NORMAN P. MASON, Commissioner,
Federal Housing Administration,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

ANGUS M. MACNEIL
547 Somerville Avenue
Somerville, Massachusetts
For the Petitioner

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Supreme Court of the United States

No. .....

GARDEN HOMES, INC.,

Petitioner.

—v.—

NORMAN P. MASON, Commissioner,
Federal Housing Administration,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Petitioner, Garden Homes, Inc., prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the First Circuit entered in this case on October 25, 1957.

Citation to Opinions Below

The opinion of the Court of Appeals is reported in 249 F. 2d 71, and is printed in Appendix B hereto (*infra*, pp. 10-13). The District Court entered its orders for dismissal of the action on March 14, 1957 (see record, appendix, case 5262, p. 24). The said judgment is not reported in published reports.

Jurisdiction

The judgment of the Court of Appeals was entered October 25, 1957 (see reported decision in 249 F. 2d 71). The jurisdiction of the Court is invoked under 28 U. S. C. 1254(1).

Questions Presented

1) Whether or not the removal of the case from the State Courts was proper in the light of several apparent deviations from the requirements of the laws?

2) Whether or not the Federal Courts should interfere with matters completely within the jurisdiction of the State Courts and which are being adjudicated by said State Court?

3) Should the dismissal, if made, be with prejudice or without?

4) What is the effect of Title 40, U. S. C., Sections 308 and 309?

5) The case should have been remanded.

The Facts

This is an action brought by the plaintiff, ancillary to a bill in equity, pending in the State Courts of the Commonwealth of Massachusetts (see record, appendix, case 5262, pp. 23-24). The said action had been instituted in 1952 but the State Courts of Massachusetts stayed their hands while the U. S. Court for New Hampshire adjudicated certain other matters between the parties. Thereafter, after the U. S. Courts concluded the matters being considered by it, the State Courts of Massachusetts proceeded with the suit 65912 eq. Thereafter, the defendant caused removal of said case to the U. S. Court for Massachusetts. (Case 56-466. Reported in 143 F. Supp. 144.) The said Court ordered said case remanded. The plaintiff, in order to effectuate the doctrine of *lis pendens*, filed an attachment and *caveat* on the Registry of Deeds in Hillsborough County, New Hampshire. The said attachment was by action in the State Courts intended as ancillary to the suit in Massachusetts. The defendant refused to appear even specially before the State Court of New Hampshire but removed the case to the U. S. District Court for New Hampshire. Thereafter, several motions for remand and dismissal were made and either denied or disregarded by the Federal Judge in New Hampshire. The Court assigned the case for trial on a date at which the counsel for the plaintiff was engaged before the Supreme Judicial Court of Massachusetts. As the said counsel was not present, the Court, upon verbal motion of the defendant, entered a dismissal with prejudice. Appeals were duly claimed.

The Court, in order to discharge the said attachment, approved a stipulation filed by the Secretary of the Treasury without the consent of the Plaintiff. This, purportedly under the provisions of Title 40 of the U. S. C.

The Plaintiff, in filing the original writ in court and entering the same, set forth no cause of action which would justify removal. The Court acted without presentation of a motion to amend the action by inserting a declaration. Said motion to amend was filed in the State Courts, but not allowed by the State Courts. After removal it was never offered to the U. S. Courts for allowance. But the Court itself took said motion out of the files and allowed it without prior notice to the plaintiff or opportunity to waive it being given. The details of the facts concerning remand and removal appear more fully in the argument.

Reasons for Granting the Writ

I

The removal was improper:

a) The matters in litigation were being adequately litigated in the State Courts of Massachusetts (see record, appendix, case 5262, p. 23). The said Court had acquired jurisdiction of the *res* by service of process and by *lis pendens* and by attachment. Therefore, interference by the Federal Court removal was improper.

b) There is no Federal issue in the pleadings prior to removal (see writ and state of pleadings at time of entry and removal, record, appendix, case 5110, p. 9). The allowance of the motion to amend was unrequested and done after removal (see record, appendix, case 5110, p. 11).

c) There is no diversity of citizenship. Both the plaintiff and defendant are subjects of the Commonwealth of Massachusetts (see record, appendix, case 5110, p. 17 and p. 25).

d) Removal was not had by reason of diversity of citizenship (see record, appendix, case 5110, p. 25, clause 11).

e) There could be no removal because of the fact that the defendant is a Federal officer under U. S. C., 28 Section 1442(a). The defendant has nothing to do with the collection of the revenue and is not concerned with the apprehension of criminals.

f) The defendant did not submit or become subject to the jurisdiction of the State Courts from which removal was had. In fact, he specifically refused to submit to the said jurisdiction (see docket entries and letter on p. 8 of record, appendix, case 5262).

g) The claim involved more than $10,000.00 and therefore outside the jurisdiction of the District Court under Section 1346 of Title 28 of the U. S. C.

h) No proof or suggestion of conformity with the requirements that removal be made within twenty days of receipt of the original pleading showing the cause of action. The defendant limited his statement in par. 5 of the Petition for Removal to the receipt of certified copy. He had prior thereto received a copy of said declaration and writ more than twenty days before removal.

i) Copies of removal petition were not served upon the plaintiff as required by statute.

j) The discharge of the attachment by the orders of the U. S. Court removed any possibility of the jurisdiction of the Court remaining because of the claim that the *res* was within the jurisdiction of the Court.

k) The action was brought solely as ancillary to the suit pending in Massachusetts (see record, appendix, case 5262, p. 5, par. 6).

l) That the necessary parties to any adjudication were not before the Court (see record, appendix, case 5262, p. 6, par. 11).

m) For the reason of *res judicata* by the United States District Court for the District of Massachusetts in case reported in 143 F. Supp. 144 and for the other reasons stated in the several motions seeking remand filed in the court at New Hampshire and set forth in the record appendices. The main issue raised is the claim that the case was removed without right and improvidently.

It has been said in *Lambert Run Coal Co.* v. *B. & O. R. Co.*, 258 U. S. 377, "If the State Court has no jurisdiction, the federal court acquires none." The defendant specifically refused to submit to the State Court. (see record, appendix, case 5262, p. 8). Therefore, it appears the Federal Court acquired no jurisdiction. See also *Bee Machine Co.* v. *Freeman*, 131 F. 2d 190.

The cause of action is not severable and the contract upon which claim was being made was tripartite. The defendant was one party along with Worcester Federal Savings and Loan Association and the plaintiff. No adjudication could be had without all parties represented and Worcester Federal Savings was not joined in this case, although a party in case 65912 at the State Courts at Boston.

It appears, therefore, that the removal was improvident at least and remand should be required.

II

The case 65912 at the Superior Court at Massachusetts contained all of the issues in litigation between the parties and no fractionation was necessary by removing some of the issues for disposition to the Federal Courts at New Hampshire after the Federal Courts at Massachusetts remanded the case removed from the State Courts of Massachusetts. See *American Fire and Casualty Co.* v. *Finn*, 341 U. S. 6, 9.

III

The dismissal, if at all, should have been without prejudice. There was no trial or determination upon merit by the Court at New Hampshire. The failure of the plaintiff to appear on the date assigned for hearing was caused by the requirement that he appear before the Supreme Judicial Court of Massachusetts. The said requirement can be assumed to have been made weeks before said day. The Federal Court at New Hampshire set the date within a day or two of the trial date itself. No reasonable opportunity to be heard was given by said Court. Therefore, the dismissal should have been, at most, one without prejudice.

IV

Title 40, Sections 308 and 309 cannot contravene the provisions of Title 12, Section 1702 *et seq.* The Court has repeatedly stated that the F. H. A. Commissioner cannot pledge the credit of the United States beyond the specific appropriations made to him by the Congress. The allowance of the motion for stipulation for discharge of attachment (record, appendix, case 5110, pp. 18 and 19) appears beyond the powers of the Court. There does not seem to be any decisions in point on said section of the U. S. C.

V

The provisions of U. S. C., Title 28, Section 1447(c) makes no provision for dismissal of an improperly removed case. It must be remanded. The failure to do so appears error.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

GARDEN HOMES, INC.
By ANGUS M. MACNEIL
Its Attorney
547 Somerville Avenue
Somerville, Massachusetts

January 18, 1958

APPENDIX A

§1447. Procedure after removal generally

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the petitioner to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise. As amended May 24, 1949, c. 139, §84, 63 Stat. 102.

APPENDIX B

MAGRUDER, *Chief Judge.*

This appeal is taken from a judgment of the United States District Court for the District of New Hampshire, entered upon motion of defendant, ordering the dismissal of a complaint with prejudice. Under Rule 41(b), Fed. Rules Civ. Proc. 28 U. S. C. A., dealing with involuntary dismissal upon motion for failure of the plaintiff to prosecute, it is provided: "Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits." In this case the district court did not specify that the dismissal should be without prejudice.

[1] The complaint, as amended, was filed originally in the Superior Court of Hillsborough County in the State of New Hampshire. It undertook to set forth a claim in the sum of one million dollars for breach of contract against the Federal Housing Commissioner, on a contract made by "the defendant or his predecessors in office" in the course of administration of the National Housing Act, 12 U. S. C. A. §1702 et seq. Incidentally, in the said §1702, the Congress authorizes the Commissioner "in his official capacity, to sue and be sued in any court of competent jurisdiction, State or Federal." Although appellant suggests in his brief that he is suing the commissioner in his individual capacity (the commissioner individually being a citizen of Massachusetts wherein plaintiff corporation was incorporated), it seems clear that this is not so. The complaint names as defendant "Norman P. Mason of Washington, D. C., as acting Commissioner of the Federal Housing Ad-

ministration." Jurisdiction was obtained by attachment of various lands and tenements of the United States of America held by the Commissioner in Hillsborough County, New Hampshire. The action was in substance one against the United States as the real party in interest. See *United States* v. *Summerlin,* 1940, 310 U. S. 414, 60 S. Ct. 1019, 84 L. Ed. 1283; *Waylyn Corp* v. *United States,* 1 Cir., 1956, 231 F. 2d 544, certiorari denied, 1956, 352 U. S. 827, 77 S. Ct. 40, 1 L. Ed. 2d 49. For further details see our decision on an earlier abortive attempt to appeal from various interlocutory orders in *Garden Homes, Inc.* v. *Mason,* 1 Cir., 1956, 238 F. 2d 654.

The defendant filed a petition for removal of the case to the federal district court. The district court denied various motions by the plaintiff to remand the case to the state court. Finally, by letter to the plaintiff dated February 18, 1957, the clerk of the district court notified plaintiff that the case was set for trial on Monday, March 4, at 11 A.M. at the Federal Building, Concord, New Hampshire, notwithstanding, so the letter recited, that the clerk had received a telephone call from Angus M. MacNeil, Esquire, attorney for the plaintiff, that he could not be present at the trial on March 4. Subsequently the district court relented, and by letter dated February 26, 1957, plaintiff was notified that the trial had been postponed to 11 A.M. on Tuesday, March 5. Still later by letter dated March 1, plaintiff was notified of a second postponement of the trial to 11 A.M. March 6. At the designated hour on March 6, no counsel having appeared for plaintiff, defendant orally moved to dismiss with prejudice under Rule 41, and this motion was granted by the district court. On the afternoon of March 6, the clerk received a letter from Angus M. MacNeil stating that he could not be present at the trial on Wednesday morning, March 6, in Concord because he would be appearing before the Supreme Judicial Court of Mas-

sachusetts. On March 14, the district court entered the formal judgment of dismissal from which this appeal is taken.

[2] Under the circumstances, considering also other instances in the case of failure diligently to prosecute, as pointed out by appellee, we cannot say that the district court abused its discretion in dismissing the complaint.

[3] It is said by the plaintiff that the dismissal should have been without prejudice because the district court lacked jurisdiction of the case. This claim is based first upon the contention that the Superior Court for Hillsborough County did not have jurisdiction and, therefore, that the federal court could not derivatively acquire jurisdiction upon removal. See *Lambert Run Coal Co.* v. *Baltimore & Ohio R. R. Co.*, 1922, 258 U. S. 377, 382, 42 S. Ct. 349, 66 L. Ed. 671; *Freeman* v. *Bee Machine Co., Inc.*, 1943, 319 U. S. 448, 449, 63 S. Ct. 1146, 87 L. Ed. 1509. The basis for this contention is allegedly an inadequate service of process. The exact basis is not too clear in the record, but appears to be failure after attachment of the property properly to notify the defendant thereof. This defect, if it existed, is a waivable one, and clearly defendant has waived it.

[4, 5] The second ground upon which plaintiff relied is that even if the Superior Court had jurisdiction, the case was improperly removed and no federal jurisdiction was acquired thereon. We reject this contention.

This is an action involving more than three thousand dollars in which by Act of Congress, in the National Housing Act, 12 U. S. C. A. §1702, the United States has consented to be sued by action against the Federal Housing Commissioner in his official capacity. The action could have been originally brought in the district court under 28 U. S. C.

§1331, and was properly removable under 28 U. S. C. §1441. Also, the complaint discloses a case of diversity of citizenship since plaintiff is a citizen of Massachusetts, and as we said in *Garden Homes, Inc.* v. *Mason,* 1 Cir., 1956, 238 F. 2d 651, 653: "Federal courts have determined that, for purposes of service of process and diversity of citizenship, the Federal Housing Administration is to be treated as a federal corporation and a citizen of the District of Columbia." Furthermore, the Congress has authorized the removal of cases of this sort under 28 U. S. C. §1442(a)(1), "since it was a civil action against an 'officer of the United States or any agency thereof' for an 'act under color of such office'." *Garden Homes, Inc.* v. *Mason,* 1 Cir., 1956, 238 F. 2d 651, 654. See *James River Apartments, Inc.* v. *Federal Housing Administration,* D. C. Md. 1955, 136 F. Supp. 24. See also Hart & Wechsler, The Federal Courts and the Federal System 1147-1148 (1953).

A judgment will be entered affirming the judgment of the District Court.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE
CONCORD

OFFICE OF THE CLERK

February 18, 1957

President
Garden Homes, Inc.
547 Somerville Avenue
Somerville 43, Massachusetts

Maurice P. Bois, Esq.
United States Attorney
Concord, New Hampshire

Re: C. 1603, Garden Homes, Inc. vs. Norman P. Mason, Commissioner, Federal Housing Administration

Dear Sirs:

This office in in receipt of a telephone call from Angus M. MacNeil on Saturday, February 16, 1957, saying that he could not be present at trial of the above-entitled case which has been set for Monday, March 4, 1957, at 11:00 A. M. at the Federal Building, Concord, New Hampshire. This case will go on on that date.

Very truly yours,

William H. Barry

William H. Barry
Clerk

WHB/mfl

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE
CONCORD

OFFICE OF THE CLERK

February 26, 1957

President
Garden Homes, Inc.
547 Somerville Avenue
Somerville 43, Massachusetts

Maurice P. Bois, Esq.
United States Attorney
Concord, New Hampshire

Re: C. 1603, Garden Homes, Inc. vs. Norman P. Mason, Commissioner, Federal Housing Administration

Gentlemen:

Jury trial of the above-entitled case set for Monday, March 4, 1957, at 11:00 A.M. has been postponed and will be had on Tuesday, March 5, 1957 at 11:00 A.M. at the Federal Building, Concord, New Hampshire.

Very truly yours,

C. Murray Sawyer

C. Murray Sawyer
Deputy Clerk

CMS/mfl

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE
CONCORD

OFFICE OF THE CLERK

March 1, 1957

President
Garden Homes, Inc.
547 Somerville Avenue
Somerville 43, Massachusetts

Maurice P. Bois, Esq.
United States Attorney
Concord, New Hampshire

Re: C. 1603, Garden Homes, Inc. vs. Norman P. Mason, Commissioner, Federal Housing Administration

Gentlemen:

Jury trial of the above-entitled case set for Tuesday, March 5, 1957, at 11:00 A.M. has been postponed and will be had on Wednesday, March 6, 1957 at 11:00 A.M. at the Federal Building, Concord, New Hampshire.

Very truly yours,

C. Murray Sawyer

C. Murray Sawyer
Clerk

CMS/mfl

March 5 1957

United States District Court
Concord, N.H.

Dear Sirs;

In accordance with previous advice sent to you I shall be engaged before the full court of the Supreme Judicial Court for the Commonwealth of Massachusetts on Wednesday morning March 6 1957 and will not be able to be present at Concord at this time. On Thursday March 7 1957 I shall be engaged before the Court of Appeals in the latter part of the morning thereby removing all possibility of being present before the United States Court at Concord N.H. at said time.

Very truly yours

A M MacNeil

Received P.M. March 6, 1957

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 749

GARDEN HOMES, INC., PETITIONER

v.

NORMAN P. MASON, COMMISSIONER, FEDERAL HOUSING ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The order of the United States District Court for the District of New Hampshire (R. 24)[1] dismissing petitioner's complaint is not reported. The opinion of the United States Court of Appeals for the First Circuit (Pet. App. B 10–13) is reported at 249 F. 2d 71.

[1] "R. —" references are to the record appendices in *Garden Homes, Inc.* v. *Mason*, C. A. 1, No. 5262; "R. App. —" references are to the record appendices in an earlier appeal by petitioner (C. A. 1, No. 5110) which was incorporated by reference (R. 34) in C. A. 1, No. 5262. Both record appendices are on file in this Court.

JURISDICTION

The judgment of the Court of Appeals was entered on October 25, 1957 (R. 43). By order of Mr. Justice Frankfurter, dated January 22, 1958, the time to file a petition for a writ of certiorari was extended to and including January 27, 1958. The petition for a writ of certiorari was filed on January 27, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether an action brought in a state court against the Federal Housing Commissioner, based upon an alleged breach of contract in the course of administration of the National Housing Act, was properly removable to the federal district court.

2. Whether, in the circumstances of the present case, the district court abused its discretion in dismissing, with prejudice, petitioner's complaint.

STATUTES AND RULE INVOLVED

1. The National Housing Act, 48 Stat. 1246, as amended, 12 U. S. C. 1702, provides in relevant part:

> The President is authorized to create a Federal Housing Administration, all of the powers of which shall be exercised by a Federal Housing Commissioner (hereinafter referred to as the "Commissioner"), who shall be appointed by the President, by and with the advice and consent of the Senate. * * * The Commissioner shall, in carrying out the provisions of this subchapter and subchapters II, III, VI–VIII, and X of this chapter, be authorized, in his official capacity, to sue and be sued in any

court of competent jurisdiction, State or Federal.

2. 62 Stat. 930, 28 U. S. C. 1331, provides:

> The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States.

3. 62 Stat. 930, 28 U. S. C. 1332, provides in relevant part:

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3,000 exclusive of interest and costs, and is between:
>
> (1) Citizens of different States; * * *

4. 62 Stat. 937, 28 U. S. C. 1441, provides in relevant part:

> (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.
>
> (b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties

in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

5. 62 Stat. 938, 28 U. S. C. 1442, provides in relevant part:

> (a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> (1) Any officer of the United States or agency thereof, or person acting under him, for any act under color of such office * * *.

6. Rule 41 (b) of the Federal Rules of Civil Procedure provides in relevant part:

> * * * Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits.

STATEMENT

1. *Background:*—It may be helpful to the Court to set forth the pertinent background litigation involving petitioner, its president and counsel, Angus M. MacNeil, and the Government, which bears upon the present case. On August 10, 1949, petitioner executed a note and mortgage to the Worcester Federal Savings and Loan Association of Worcester, Massachusetts for $1,252,009, pledging, among other things, certain New Hampshire real estate as security. Petitioner thereafter defaulted on its payments, and,

pursuant to the terms of the note, the bank declared payable the principal and interest due. Since the loan had beeen insured under the National Housing Act, 48 Stat. 1246, as amended, 12 U. S. C. 1703, the bank assigned the note and mortgage to the Federal Housing Administration. The United States commenced foreclosure proceedings in the United States District Court for the District of New Hampshire, and, on June 18, 1953, the district court, upon a finding of clear default, ordered foreclosure. *United States* v. *Garden Homes, Inc.*, 113 F. Supp. 415 (D. N. H.), affirmed, 210 F. 2d 281 (C. A. 1). Prior to the conclusion of the action in the district court, petitioner had taken an appeal challenging the district court's appointment of a receiver to operate and manage the property as well as to collect rents and profits therefrom. The Court of Appeals held that an insufficient showing had been made to warrant the appointment of a receiver to operate and manage the property and that sufficient protection was afforded if the receiver collected the rents and profits of the property. *Garden Homes, Inc.* v. *United States*, 200 F. 2d 299 (C. A. 1). On remand, the district court appointed a receiver to collect all rents and profits and ordered him to pay to petitioner all necessary expenses for maintenance of the property. Petitioner immediately appealed from this order and argued that it should be allowed to collect the rents and profits, and, after payment of expenses, turn over the net proceeds to the receiver. The Court of Appeals found "no support in reason or authority for this proposition" and affirmed the order of the dis-

trict court. *Garden Homes, Inc.* v. *United States*, 207 F. 2d 459 (C. A. 1). Thereafter, upon petitioner's plea that it was a hardship to require it to pay expenses in the first instance, the district court, on September 17, 1953, ordered the receiver to pay petitioner's expenses upon presentation, if it appeared that such expenditures were proper. At a hearing held on June 27, 1955, upon the receiver's final report, the court's attention was directed to MacNeil's failure to disburse to petitioner's creditors funds paid to him for that purpose by the receiver. The court ordered MacNeil to produce the money in court within 20 days, and, subsequently, after notice and hearing, MacNeil was adjudged guilty of civil and criminal contempt for his failure to comply with the court's order. On August 10, 1956, the Court of Appeals affirmed the judgment of criminal contempt but reversed the finding of civil contempt. *MacNeil* v. *United States*, 236 F. 2d 149 (C. A. 1). MacNeil's petition for certiorari was denied by this Court, 352 U. S. 912.[2]

[2] After the mandate reached the district court, MacNeil was ordered to pay his fine ($400) within 48 hours. MacNeil did not comply, and, on January 3, 1957, the district court issued to the Marshal for the District of New Hampshire a bench warrant ordering the apprehension of MacNeil. On January 4, 1957, the United States Marshal for the District of Massachusetts, Ralph W. Gray, executed the warrant by having one of his deputies arrest MacNeil in the corridor of the courthouse of the Massachusetts District Court for the District of Somerville. MacNeil was conveyed to Concord, New Hampshire and surrendered to the New Hampshire Marshal on the same day. Thereafter, MacNeil brought suit against Gray in the Superior Court of the County of Suffolk, Commonwealth of Massachusetts, alleging abuse of process and false

2. *This litigation:*—Alleging that the foreclosure pro- (*supra*, p. 5) were caused by a breach of con- defendant or his predecessor in office" petitioner, in a complaint filed on July 28, 1955, in the Superior Court of Hillsborough County in New Hampshire, sought to recover the sum of one million dollars (R. App. 9–10).[3] The complaint named as defendant "Norman P. Mason of Washington, D. C., as Acting Commissioner of the Federal Housing Administra-

arrest. The suit was removed to the United States District Court for the District of Massachusetts, and, on January 2, 1958, Judge Wyzanski granted the Government's motion for summary judgment. *Angus M. MacNeil* v. *Ralph W. Gray*, Civil Action No. 57–931–W. On January 27, 1958, MacNeil filed a notice of appeal.

[3] Petitioner alleged, *inter alia*, that (R. App. 9–10): "the defendant, or his predecessor in office, did fail to perform the terms of said agreement by refusing and failing to furnish the guaranteed payments at the times and in the amounts provided for in said agreement, although the plaintiff performed its part of said agreement, thereby causing the plaintiff to be diversed of the legal title of said real estate through foreclosure proceedings wherein the rights of the plaintiff herein against said defendant, or his predecessor in office, for the breach of said agreement could not be and were not adjudicated, and as a result of said foreclosure the legal title to said real estate was acquired by the defendant, or his predecessor in office, as appears in the records at said Hillsborough County Registry of Deeds, at a price which did not reflect the true value of said real estate, thereby destroying the economic security and stability of the plaintiff's housing project on said real estate; depriving the plaintiff of its use and possession of property; causing the plaintiff to incur great financial loss and damage; and placing the credit and business reputation of the plaintiff in jeopardy, contrary to the covenant of the defendant, or his predecessor in office, aforesaid; and so the defendant, or his predecessor in office, his covenant has not kept, but has broken the same, all to the damage of the plaintiff as it says, in the sum of One Million Dollars."

tion" and jurisdiction was obtained by attachment in Hillsborough County, New Hampshire, of various real estate owned by the Government and held by the Commissioner in his official capacity (R. 9–10).[4]

On October 17, 1955, upon petition of the Government, the action was removed to the United States District Court for the District of New Hampshire (R. App. 7). The Government then filed, on Decem-

[4] On August 9, 1955, petitioner also initiated a similar action entitled "*Garden Homes, Inc.* v. *Norman P. Mason*, as he is Commissioner of Federal Housing Administration" in the District Court of Somerville, a District Court of the Commonwealth of Massachusetts. That action was removed by the Government to the United States District Court for the District of Massachusetts. The district court thereafter granted the Government's motion to dismiss based upon petitioner's failure to secure effective service. (Service had been attempted by leaving a copy of the summons under the door of Mason's personal residence in Chelmsford, Massachusetts.) The Court of Appeals affirmed the dismissal. *Garden Homes, Inc.* v. *Norman P. Mason*, 238 F. 2d 651 (C. A. 1). Petitioner then sought to have defendant Mason defaulted in the Somerville District Court. The state court (Brine, J.) refused to grant petitioner's motion to default after being apprised of the removal proceedings. Petitioner then brought suit for a writ of certiorari against Judge Brine urging that his action be corrected. A motion for the issuance of an order of notice on this writ of certiorari was denied by the Superior Court for the County of Middlesex, which denial was affirmed on petitioner's appeal to the Supreme Judicial Court of the Commonwealth of Massachusetts. *Garden Homes, Inc.* v. *District Court of Somerville*, No. 11,881, decided December 4, 1957, 146 NE. 2d 372 (Supreme Judicial Ct. Mass.).

(For other litigation involving petitioner's counsel and justices of the Commonwealth of Massachusetts, see *Handy Cafe, Inc.* v. *Justices of the Superior Court*, 248 F. 2d 485 (C. A. 1), pending on petition for a writ of certiorari, No. 748, Oct. T. 1957; *MacNeil Bros. Co.* v. *Justices of the Superior Court*, 242 F. 2d 273 (C. A. 1.), certiorari denied, 355 U. S. 805.)

ber 5, 1955, a motion to vacate the attachment,[5] which was taken under advisement by the district court (R. App. 19). Thereafter, petitioner filed on December 12, 1955, a "motion to strike the petition for removal" (R. App. 28); on December 13, 1955, a "motion to strike petition to remove action" (R. App. 27); on January 3, 1956, a "petition for restraining order and injunction" (R. App. 26–27); and, on January 3, 1956, a "request for immediate remand and for abstention of action" (R. App. 37–38). Petitioner's motions came on for hearing on March 12, 1956 (R. App. 3–4). However, petitioner's counsel failed to appear and, on the next day, petitioner's motions were denied by the district court (R. App. 4).[6] On March

[5] The motion was based upon 40 U. S. C. 308 and 309. Section 308 provides that, when any property in which the United States may have an interest shall in any judicial proceeding be attached as security for any claim made against such property, the Secretary of the Treasury may cause a stipulation to be entered by the proper district attorney for the discharge of such property from attachment stating that, upon such discharge, the person asserting the claim against the attached property shall become entitled to all the benefits of Sections 308 and 309. The latter section provides the procedure for the payment of claims pursuant to a formal judgment in such a proceeding. The Government's motion was accompanied by a stipulation, filed upon instruction of the Acting Secretary of the Treasury, to the effect that, upon discharge of the attachment, petitioner would become entitled to all the benefits of 40 U. S. C. 308 and 309 (R. App. 18).

[6] Petitioner's counsel, who was not a member of the bar of the District of New Hampshire, was repeatedly advised by the court that, under the court's rules, he was required to associate with a member of the bar of the district. *Rule 4 of the Rules of Civil Procedure of the United States District Court for the District of New Hampshire.* Petitioner consistently re-

23, 1956, the Government's motion to vacate the attachment was granted (R. App. 6). See *Garden Homes, Inc.* v. *Mason*, 142 F. Supp. 744 (D. N. H.). An attempted appeal by petitioner from the denial of his various motions was dismissed for lack of jurisdiction. *Garden Homes, Inc.* v. *Mason*, 238 F. 2d 654 (C. A. 1).[7]

On January 14, 1957, the district court ordered the case set for trial on March 4, 1957 (R. 2). By letter to the petitioner dated February 18, 1957, the clerk of the district court reaffirmed the trial date of March 4, 1957, notwithstanding, so the letter recited, that the clerk had received a telephone call from petitioner's attorney that he could not be present on that date (R. 30). However, the district court relented, and by letter dated February 26, 1957, the clerk advised petitioner that the trial had been postponed to 11:00 a. m. on March 5, 1957 (R. 21). By letter dated March 1, 1957, petitioner was informed of a second postponement of the trial to 11:00 a. m. on March 6, 1957 (R. 32).

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fused to comply with this requirement. (See *United States* v. *Garden Homes, Inc.*, 113 F. Supp. 415 (D. N. H.); see, also, R. App. 40.)

[7] During the pendency of that appeal, petitioner filed another motion to remand which was denied by the Court of Appeals. Also pending appeal, and after filing its brief, petitioner filed a "motion for leave to file motion for discontinuance without prejudice in the district court." Petitioner later requested the clerk to withhold submission of this motion to the court. The Government asked for, and was given, an extension of time within which to file its brief, since a granting of petitioner's motion would have obviated the necessity of a Government brief on appeal. Petitioner thereafter withdrew its motion.

Meanwhile, petitioner had filed on February 21, 1957, a "motion for remand" and a "motion to decline jurisdiction" (R. 2, 4–7, 9–10); and, on February 26, 1957, a "motion to remand for lack of jurisdiction" and a "motion for remand for reasons of the law of the case" (R. 2, 10–13, 13–16). On March 2, 1957, petitioner filed another "motion for remand" and a "motion for the taking of judicial notice" (R. 2, 16–19); and on March 4, 1957, still another "motion for remand" and another "motion of plaintiff for taking of judicial notice" was filed (R. 2, 19–22).

At the time and date set for trial, no one appeared on behalf of petitioner. The Government thereupon orally moved to dismiss with prejudice under Rule 41 of the Federal Rules of Civil Procedure, and this motion was granted by the district court (R. 2). During the afternoon, the clerk of the court received a letter from petitioner's counsel, dated March 5, 1957, stating that he could not be present at the trial which had been set for that morning as he would be appearing before the Supreme Judicial Court of Massachusetts (R. 33).[8] On March 14, 1957, the district court entered a formal judgment of dismissal (R. 24) which, because it did not specify that it was without prejudice, "operates as an adjudication upon the merits." Fed. R. C. P. 41(b), *supra*, p. 4.

[8] The letter states that it was "[i]n accordance with previous advice sent to you"; however, there is nothing in the files or record of the district court indicating that such "previous advice" had been sent.

The Court of Appeals affirmed (R. 43). It noted that (R. 41) "[u]nder the circumstances, considering also other instances in the case of failure diligently to prosecute, as pointed out by appellee, we cannot say that the district court abused its discretion in dismissing the complaint." Petitioner's other contentions on appeal, which were addressed to an alleged lack of jurisdiction in the lower court, were also rejected by the Court of Appeals (R. 41–42).

ARGUMENT

Petitioner's essential contention is that "the case was removed without right" from the state court to the federal district court (Pet. 6). There are at least three separate and proper bases for removal in this case—any one of which is a complete answer to petitioner's contention. Petitioner's other argument, *i. e.*, "the dismissal should have been, at most, one without prejudice" (Pet. 7), was properly rejected by the Court of Appeals because, after consideration of the circumstances and history of this drawn-out litigation, it was of the unanimous view that the district court had not abused its discretion. Further review by this Court is not warranted.

1. Under the general removal statute, 62 Stat. 937, 28 U. S. C. 1441, *supra*, p. 3, "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant * * * to the district court of the United States for the district and division embracing the place where such action is pending." Clearly, petitioner's complaint in the state

court, which set forth a claim in the sum of one million dollars against the Federal Housing Commissioner for an alleged breach of contract in the course of his administration of the National Housing Act, could have originally been brought in the district court.

In the first place, it could have been brought under 28 U. S. C. 1332, *supra*, p. 3, as involving, between citizens of different states, an amount in controversy clearly in excess of $3,000.[9] It is apparent that the complaint disclosed a case of diversity of citizenship since petitioner is a citizen of Massachusetts, and, for purposes of diversity, the Federal Housing Administration is treated as a citizen of the District of Columbia. *Garden Homes, Inc.* v. *Mason*, 238 F. 2d 651, 653 (C. A. 1); *James River Apartments, Inc.* v. *Federal Housing Administration*, 136 F. Supp. 24 (D. Md.). Petitioner insists here (Pet. 4), as it did in the courts below, that the suit is one against the Commissioner in his individual capacity, and, since the Commissioner is also a citizen of Massachusetts, diversity is lacking. However, the plain fact is that petitioner's complaint named as defendant "Norman P. Mason of

[9] Contrary to petitioner's assertion (Pet. 5), the $10,000 limitation of the Tucker Act, 28 U. S. C. 1346 (a) (2), is inapplicable to suits in the district court against the Federal Housing Commissioner. The National Housing Act specifically provides (49 Stat. 722, 12 U. S. C. 1702) that the Commissioner in his official capacity may "sue and be sued in any court of competent jurisdiction, State or Federal." See *Ferguson* v. *Union Nat. Bank of Clarksburg, W. Va.*, 126 F. 2d 753 (C. A. 4), where the court expressly held inapplicable the Tucker Act limitation to this type of suit; see, also, *George H. Evans & Co.* v. *United States*, 169 F. 2d 500 (C. A. 3).

Washington, D. C., as acting Commissioner of the Federal Housing Administration" (R. App. 9), and jurisdiction in the state court was obtained by attachment in Hillsborough County, New Hampshire, of real estate owned by the United States and held by the Commissioner in his official capacity (R. App. 11).

Moreover, the action could also have been brought originally in the district court under 28 U. S. C. 1331, *supra*, p. 3 (and thus properly removable under the general removal statute), since it involved an action arising under the "laws" of the United States (the National Housing Act) and the matter in controversy exceeded the sum of $3,000. See *Perpetual Building & Loan Ass'n., et al.* v. *Series Directors, et al.*, 217 F. 2d 1 (C. A. 4), certiorari denied, 349 U. S. 911 (12 U. S. C. 1716 (c)) *Machine Tool & Equipment Corp.* v. *R. F. C.*, 131 F. 2d 547 (C. A. 9) (15 U. S. C. 603 (a)); *Sabin* v. *H. O. L. C.*, 147 F. 2d 653 (C. A. 10), certiorari denied, 326 U. S. 759 (12 U. S. C. 1463 (a)); *James River Apartments, Inc.* v. *Federal Housing Administration*, 136 F. Supp. 24 (D. Md.).

Finally, wholly apart from the propriety of removal under the general removal statute, Congress has, in 28 U. S. C. 1442 (a) (1), *supra*, p. 4, specifically provided for the removal of cases of this type, *i. e.*, it clearly involves a "civil action" against an "officer of the United States or any agency thereof" for an "act under color of such office." *Sarner* v. *Mason*, 228 F. 2d 176 (C. A. 3), certiorari denied, 351 U. S. 924; *Garden Homes, Inc.* v. *Mason*, 238 F. 2d 651, 654 (C. A. 1); *James River Apartments, Inc.* v. *Federal Housing Administration*, 136 F. Supp. 24

(D. Md.); see Hart & Wechsler, *The Federal Courts and the Federal System* (1953), 1147–1148. Unquestionably, the action was properly removable.[10]

2. The district court's dismissal of petitioner's complaint with prejudice did not, as the Court of Appeals properly ruled, constitute an abuse of discretion.

After its attempted appeal from various interlocutory orders had been dismissed, petitioner was finally notified by letter dated January 14, 1957, that the case would be tried in the district court at Concord, New Hampshire, on March 4, 1957 (R. 2). On February 16, 1957, approximately one month after receiving notice of trial, petitioner's counsel, whose office is in Somerville, Massachusetts, called the clerk of the court and informed him that the March 4th date would not be convenient (R. 30). At first, the court indicated that the date of trial would not be changed (R. 30); however, by letter dated February 26, 1957, petitioner was notified that the trial would be postponed to March 5, 1957 (R. 31). By letter dated March 1, 1957, petitioner was advised of a second postponement of the trial to March 6, 1957 (R. 32). Instead of calling (as he had previously done), sending a wire, or immediately mailing a letter to the clerk, advising of the inconvenience of the March 6th

[10] Petitioner also asserts (Pet. 6) that the federal court could not acquire jurisdiction upon removal because the state court did not have jurisdiction. This statement is difficult to understand. The court below noted (Pet. App. B 12): "The basis for this contention is allegedly an inadequate service of process. The exact basis is not too clear in the record, but appears to be failure after attachment of the property properly to notify the defendant thereof. This defect, if it existed, is a waivable one, and clearly defendant has waived it."

date, counsel for petitioner, who had consistently refused to associate himself with a member of the district court's bar (as required by the court's rules, see *supra*, p. 9, fn. 6), by letter dated March 5, 1957, informed the court that he would be appearing before the Supreme Judicial Court of Massachusetts on March 6, 1957, and therefore could not be present for trial (R. 33). This letter was not received by the clerk until the afternoon of March 6, 1957 (R. 33); that morning, no counsel having appeared for petitioner, the district court granted the Government's oral motion to dismiss with prejudice. The failure of petitioner's counsel to appear in court on that date,[11] and the cavalier manner in which he informed the court of his other engagement, was but the last of a series of actions demonstrating petitioner's total lack of concern in having its case diligently prosecuted, or in complying with the rules of court.[12] The record, as we noted above, *supra*, pp. 9, 11, is replete with numerous repetitive motions filed by petitioner, all designed to avoid trial. Its earlier abortive appeal from various interlocutory orders was further indication of petitioner's desire to delay adjudication on the merits (see R. App.

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[11] As noted above, *supra*, p. 9, petitioner's counsel had once before failed to appear before the same trial judge at the hearing in connection with the various motions he had filed.

[12] In this connection it should also be noted that, on its first appeal (*Garden Homes, Inc.* v. *Mason*, 238 F. 2d 654 (C. A. 1)), petitioner failed to file a bond for costs as required by Rule 73 (c) of the Federal Rules of Civil Procedure. The court denied the Government's motion to dismiss, and allowed petitioner to file out of time. On this appeal, petitioner, for the second time, failed to file a bond within the proper time, and was again granted leave for late filing.

49–50 for the ten listed orders from which petitioner sought appeal). And, in view of the entire background of this litigation, the trial judge, who had lived with this case from the outset, was justified in dismissing the complaint with prejudice when petitioner's counsel failed to appear.[13]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.
GEORGE COCHRAN DOUB,
Assistant Attorney General.
SAMUEL D. SLADE,
SEYMOUR FARBER,
Attorneys.

FEBRUARY 1958.

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[13] The formal judgment of dismissal was not entered until March 14, 1957 (R. 24). Petitioner did not file a motion under Rule 60 (b) of the Federal Rules of Civil Procedure and attempt to seek relief, on grounds of "mistake, inadvertence, surprise, or excusable neglect," from the effect of the final judgment.

U. S. GOVERNMENT PRINTING OFFICE: 1958